91-1698

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ROGER OLSON,

Petitioner,

versus

GENERAL DYNAMICS CORPORATION, ALLIED SIGNAL, INC., AMEX SYSTEMS CORPORATION, SCIENCE APPLICATIONS INTERNATIONAL CORPORATION and SAIC RANGE SYSTEMS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Because ERISA's civil remedy scheme is silent as to remedies available to Olson for the oral misrepresentations of Defendants regarding the level of benefits Olson would receive on retirement, should the Defendants be estopped under Federal common law from denying OLSON the benefits they had promised?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Roger Olson, and the Respondents, General Dynamics Corporation, Allied Signal, Inc., Amex Systems Corporation, Science Applications International Corporation, SAIC Range Systems.

The parties before this Court are the same: Petitioner Roger Olson, and Respondents General Dynamics Corporation, Allied Signal, Inc., Amex Systems Corporation, Science Applications International Corporation, SAIC Range Systems.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 3

A. Factual History 3

B. Procedural History 4

REASONS FOR GRANTING THE WRIT 7

The Ninth Circuit Has Rendered a Decision In Conflict With the Decision of Another United States Court of Appeal on the Same Matter 7

CONCLUSION 12

APPENDIX A A1

TABLE OF AUTHORITIES

Page

CASES

Apponi v. Sunshine Biscuits, Inc. (6th Cir. 1987) 809 F.2d 1210 10

Armistead v. Vernitron Corp. (6th Cir. 1991) 944 F.2d 1287 reh. en banc den. 1991 U.S. App. LEXIS 26627 ..... 9, 10, 11

Black v. TIC Investment Corp. (7th Cir. 1990) 900 F.2d 112 11

Bogue v. Ampex Corp. (N.D.Cal. 1990) 759 F.Supp. 424 9

Dockray v. Phelps Dodge Corp. (9th Cir. 1986) 801 F.2d 1149 9

Ellenburg v. Brockway, Inc. (9th Cir. 1985) 763 F.2d 1091 9

Lingle v. Norge Div. of Magic Chef, Inc. (1988) 486 U.S. 399 10

Livernois v. Warner-Lambert Co., Inc. (4th Cir. 1983) 723 F.2d. 1148 11

Nachwalter v. Christie (11th Cir. 1986) 805 F.2d 956 10

Philips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), cert.denied, 481 U.S. 1016 (1987) 7

Powell v. General American Life Insurance Co. (1990) 221 Cal.App.2d 817 rev.den. LEXIS 4111 (Cal.1990) 9

TABLE OF AUTHORITIES – Continued

Page

Rosen v. Hotel & Restaurant Empl. Etc. (3rd Cir. 1981) 637 F.2d. 592 reh.den. 454 U.S. 898 11

Scheuer v. Central States Pension Fund (E.D. Wisc. 1975) 358 F.Supp. 1332 aff'd, 570 F.2d 349 (7th Cir. 1977) 12

Straub v. Western Union Telegraph Co. (10th Cir. 1988) 851 F.2d 1262..... 10

OTHER AUTHORITIES

28 U.S.C. 158(a) 3

28 U.S.C. 158(d) 2

28 U.S.C. 1331..... 2

28 U.S.C. 1441(a) 2

29 U.S.C. 1001 et seq..... 5

29 U.S.C. 1102(a) 9

HR REP 533, 93rd Congress, 1st Session (A34-A35; A66-A67)..... 8

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ROGER OLSON,

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GENERAL DYNAMICS CORPORATION, ALLIED SIGNAL, INC., AMEX SYSTEMS CORPORATION, SCIENCE APPLICATIONS INTERNATIONAL CORPORATION and SAIC RANGE SYSTEMS,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Roger Olson, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on December 20, 1991, and finally decided by an Order Denying Petitioner's Petition for Rehearing on January 24, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit in this case is reported at 951 F.2d 1123, and reprinted in full in Appendix A at pages A1-A13. The order denying the Petitioner's petition for rehearing is reprinted in Appendix A at A23.

The Memorandum Decision of the United States District Court for the Southern District of California (Thompson, Gordon, Chief Judge) has not been reported but is reproduced in Appendix A at pages A14-A19.

JURISDICTION

A. The jurisdiction of the United States District Court over this matter was based on 28 U.S.C. 1331 (A24) and 29 U.S.C. 1001 *et seq.* (ERISA). (A26-A28)

The case was accordingly removed from San Diego Superior Court, where it was originally filed, under authority of 28 U.S.C. 1441(a). (A25-A26)

B. The orders and judgments entered in the United States District Court on March 21, 1990 disposed of all claims with respect to all parties and were appealable as final judgments. (A20)

C. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was timely filed on April 20, 1990. (A21-A22) Decision was entered on December 20, 1991. (A1)

D. The jurisdiction of the Circuit Court was based upon 28 U.S.C. 158(d), a final judgment of the United

States District Court having been entered under 28 U.S.C. 158(a). (A25)

E. Petitioner timely petitioned for rehearing which was denied on January 24, 1992. (A23)

STATEMENT OF THE CASE

A. FACTUAL HISTORY

Plaintiff ROGER OLSON (OLSON) had been an employee of defendant GENERAL DYNAMICS CORP. (GENERAL DYNAMICS) since 1955. At the time of the events at issue, OLSON was an engineer in GENERAL DYNAMICS' Range Systems Product Line Division (Range Systems). In the spring of 1986, management representatives of GENERAL DYNAMICS and Defendant ALLIED SYSTEMS CORP. AMEX DIVISION (AMEX) informed Range Systems' employees, including OLSON, of the sale of Range Systems by GENERAL DYNAMICS to AMEX.

GENERAL DYNAMICS told the employees that, upon finalization of the sale, the Range Systems employees would be terminated by GENERAL DYNAMICS and AMEX would make employment offers to them. The employees were also told that GENERAL DYNAMICS would not rehire Range Systems employees for a period of two years after the sale.

The president of AMEX promised the Range Systems employees, in a video taped presentation that, should they elect to become AMEX employees after the sale of the product line, they would not suffer financially: "I

commit to you that in no way will you be injured. On the bottom line, you will be equal or better to your present position." Representatives of GENERAL DYNAMICS then told the employees that its objective was to secure a buyer for Range Systems who would be able to hire the employees and be fair with them by taking into account the employees' current pay and benefit level at GENERAL DYNAMICS.

OLSON, at the time of the sale, had two years and three months left to be eligible for retirement from GENERAL DYNAMICS. He accepted AMEX' offer believing AMEX and GENERAL DYNAMICS would abide by their promises and their declarations of concern that he would not be adversely affected financially by the move.

AMEX ultimately sold Range Systems to Defendant SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, where the product line became SAIC RANGE SYSTEMS (SAIC). OLSON retired from SAIC. OLSON then discovered that the total level of retirement benefits he was entitled to was considerably less than he would have received had he retired from GENERAL DYNAMICS, i.e., he *was* "injured" on the "bottom line".

B. PROCEDURAL HISTORY

On April 17, 1989 OLSON filed Complaint for fraud and contract damages against Defendants in the Superior Court of San Diego County, California. OLSON alleged he was entitled to be made whole in the amount of the difference between what he received as retirement, medical and dental benefits and that which he would have

received had he retired from GENERAL DYNAMICS, a sum of $150,000.00.

Defendants removed the action to Federal Court and moved to dismiss on the grounds that OLSON's claims "related to" Defendants' pension and benefit plans and were therefore preempted by ERISA[1] as ERISA preempts all state law claims directly or indirectly relating to employee benefit plans. The motion for dismissal was based on the ground that OLSON had stated no cause of action under ERISA.

The District Court granted Defendants' motion to dismiss and granted OLSON leave to file a First Amended Complaint which was filed on October 10, 1989. This Complaint alleged the same facts of fraud, alleged that this type of fraud is not covered by ERISA and requested declaratory relief asking the Court to fashion a remedy for fraud under the doctrine of Federal common law.

GENERAL DYNAMICS moved to dismiss the First Amended Complaint on grounds of ERISA preemption and the other Defendants joined, answered the complaint and moved for summary judgment. The thrust of these motions were that Defendants committed no fraud and even if they had, OLSON's fraud and declaratory relief counts were preempted by ERISA.

OLSON responded that his damages could be calculated without interpreting any ERISA plan so his claim did not "relate to" a plan in any way.

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[1] Employee Retirement Income Security Act of 1974; 29 U.S.C. 1001 *et seq.*

By Memorandum Decision and Order entered March 21, 1990, the District Court found that OLSON's claim arose as a participant in plans of Defendants, was "related to" those plans and was preempted by ERISA, relying on authority from the Tenth and Eleventh circuits. The Court declined to devise a special remedy for OLSON's fraud claim as it " . . . would defeat the scheme created by Congress in ERISA."

Judgment was entered on March 21, 1990 granting GENERAL DYNAMIC'S motion to dismiss and the remaining Defendants' Motion for Summary Judgment. Notice of Appeal was timely filed April 20, 1990.

OLSON stated two issues for review, one of which is the focus of this Petition:

Should the District Court have fashioned a remedy under the doctrine of Federal common law if OLSON had no remedy under ERISA for the fraud of Defendants?

On December 20, 1991, the Court of Appeals for the Ninth Circuit handed down its decision. It agreed with the District Court that, to devise a Federal common law remedy for an oral misrepresentation of an employer concerning expected level of benefits, would contravene ERISA'S statutory scheme. In answer to OLSON's contention that ERISA does not provide a remedy for this type of fraud the Court responded:

> There is simply no reason to assume that Congress intended ERISA'S preemptive reach to be coextensive with the Act's civil remedial scheme.

In arriving at its opinion, the Court relied on *Philips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) as addressing OLSON's precise question:

> The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit the actions formerly prohibited by state law. It is the very conflict between the Federal scheme and State law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based.

The Ninth Circuit Court of Appeals thus adopted the Eleventh Circuit's position that if an employee has no remedy for an oral misrepresentation of an employer under ERISA, the Federal Court will deny him or her any common law remedy, State or Federal.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Has Rendered a Decision In Conflict With The Decision of Another United States Court of Appeal On The Same Matter.

Certiorari should be granted to resolve the conflict between the decision of the United States Court of

Appeals for the Ninth Circuit below and the decisions of other United States Courts of Appeals.

The Ninth Circuit has stated that OLSON, Petitioner herein, has no remedy under ERISA as a defrauded employee. OLSON is prohibited from claiming his common law remedies in state Court because the preemption doctrine has taken away OLSON's fundamental rights, sacrosanct under the common law, that promised that " . . . for every wrong there is a remedy . . . ". This Court stands between Olson and Congress, said by the Ninth Circuit to have created this gap for the purpose of protecting employees' rights. Where is OLSON's protection now that he has no remedy because "Congress took it away" and the courts turn away from their traditional role?

Congress's primary intent in enacting ERISA was to protect those employee benefits and expectations which pre-ERISA law failed to protect. (HR REP No 533, A34-35). By enacting ERISA, Congress sought to strengthen and broaden the woefully *inadequate* remedies existing previously, not to eliminate them. (*Id.* at A66-A67) Congress intended that employees continue to have the full range of legal and equitable remedies available in state and federal courts. (*Id.* at A67)

Pre-ERISA Courts applied estoppel to enforce employers' misrepresentations to employees about benefits they would receive under plans.[2] Congress did not

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[2] It is interesting to note that post-ERISA, the Ninth Circuit will apply estoppel against an employer in cases of

(Continued on following page)

intend to eliminate viable theories of recovery, such as estoppel, that employees successfully asserted in pre-ERISA benefit cases. To deny OLSON an equitable common law remedy previously available to him by a mechanical rule makes no sense unless the rule furthers ERISA'S goals. Congress did not intend to eliminate theories of recovery but rather to expand employees' rights to receive benefits. See: *Powell v. General American Life Insurance Co.* (1990) 221 Cal.App.3d 817, 823. rev. den. 1990 Cal.Lexis 4111 (Cal.1990).

The Ninth Circuit indulged in no such reasoning. Its reason for denying OLSON a remedy? *Congress* left a gap in the law, and since OLSON's fraud claim "relates to" an employee benefit plan, it is preempted. Congress has endorsed this use of ERISA to perpetrate a fraud. Lying to employees is permissible under ERISA provided the lie is not in writing. Other circuits have come to a different conclusion.

Other circuits maintain that ERISA authorizes the Courts to apply the Federal common law of equitable estoppel to enforce the agreements that ERISA brings within its jurisdiction. *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F.2d 1287, 1300 reh. en banc denied 1991 U.S.App.LEXIS 26627 stated that the purpose of Congress in enacting 29 U.S.C. 1102(a) would not be frustrated by

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misrepresentation concerning pension plans: *Dockray v. Phelps Dodge Corp.* (9th Cir. 1986) 801 F.2d 1149; *Ellenburg v. Brockway, Inc.* (9th Cir. 1985) 763 F.2d 1091; *Bogue v. Ampex Corp.* (N.D.Cal. 1990) 750 F.Supp. 424, 430 (Employer who in not the administrator of the plan can be estopped as recovery from employer would not diminish the fund.)

recourse to estoppel principles which are generally applicable to all legal actions, relying on the Federal common law of contracts in LMRA cases.[3]

Armistead applied equitable estoppel to prevent the employer from unilaterally terminating a retirement insurance program where the employer had made oral representations to potential retirees. The Court distinguished *Nachwalter v. Christie* (11th Cir. 1986) 805 F.2d 956 (holding that ERISA retirement plans cannot be modified by oral agreement).[4] The written plan requirement of ERISA would not be frustrated by the application of estoppel principles where the plan was an insurance benefit plan as distinguished from a pension plan in which actuarial soundness was an issue. OLSON's claims involve insurance benefits plans.[5]

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[3] *Lingle v. Norge Div. of Magic Chief, Inc.* (1988) 486 U.S. 399; *Apponi v. Sunshine Biscuits, Inc.* (6th Cir. 1987) 809 F.2d 1210, reh. den. 484 U.S. 820.

[4] *Nachwalter* and *Straub v. Western Union Telegraph Co.* (10th Cir. 1988) 851 F.2d 1262 reason that ERISA'S requirement that the written terms of a benefit plan shall foreclose the argument that Congress intended to incorporate common law notions of estoppel.

[5] If the retirement benefit were a funded pension plan, enforcement of oral modifications had the potential of diluting the assets of the fund to the detriment of other plan participants. The insurance benefit plans were unfunded and in existence by employer payment of periodic premiums to the carrier, therefore, no harm to other plan participants would accrue and estoppel would be appropriate.

The Seventh Circuit also applies estoppel principles against an employer. *Black v. TIC Investment Corp.* (7th Cir. 1990) 900 F.2d 112 reasoned that, because ERISA was silent on the issue, it was free on public policy grounds to use common law principles. *Black* involved a one employer fund in which actuarial soundness was not an issue. The Court stated that there was no good reason for an employee who reasonably relies, to his detriment, on his employer's false statement to suffer *and* there was no reason for an employer to profit from his misrepresentation.[6]

Both *Black* and *Armistead* analyzed the type of plans involved and, where ERISA did not provide a remedy, carefully considered ERISA'S provisions and policies in light of common law principles before applying estoppel. The Ninth Circuit engaged in no such analysis.

Principles of detrimental reliance came into play to estop an employer who refused to pay pension benefits when employees relied on employer's oral representation that there would be no break in service if employees brought pension contribution arrearages current. *Rosen v. Hotel & Restaurant Empl. Etc.* (3rd Cir. 1981) 637 F.2d. 592, reh. denied 454 U.S. 898:

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[6] GENERAL DYNAMICS sold Range Systems to AMEX as a going concern, intending to include highly trained employees, by the device of firing the employees and agreeing with AMEX not to rehire them for two years after the sale. Range Systems was therefore more valuable to buyer and seller, but the employees lost. See: *Livernois v. Warner-Lambert Co., Inc.* (4th Cir. 1983) 723 F.2d. 1148, 1151,n.5

> The *sui generis* nature of the pension agreement . . . should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relationships which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds . . . If anything, estoppel is appropriate here. The complexity of the typical fund agreement and the trustees' freedom to decide as they wish make it unlikely that workers will disregard promises made to them. *Id.* at 598 citing *Scheuer v. Central States Pension Fund* (E.D. Wisc. 1975) 358 F.Supp. 1332 aff'd, 570 F.2d 349 (7th Cir. 1977)

CONCLUSION

Congress intended to eliminate inequities in the private employee benefit system when it enacted ERISA as a comprehensive statute designed to prevent forfeiture of benefits, plan insolvency and misuse of fund assets. By enacting ERISA, Congress did not intend to eliminate theories of recovery but rather to expand employees' rights to receive benefits. To not estop ERISA plans based on oral promises is inconsistent with ERISA'S primary policy goal, to protect the expectations of plan participants.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER OLSON, *Plaintiff-Appellant* v. GENERAL DYNAMICS CORPORATION, a foreign corporation; ALLIED SIGNAL, INC., a foreign corporation; AMEX SYSTEMS CORPORATION, (a wholly owned subsidiary of Allied Signal Inc.); SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, a foreign corporation; SAIC RANGE SYSTEMS, a California corporation and DOES 1 through 50 inclusive, *Defendants-Appellees.*	No. 90-55688 D.C. No. CV-89-0789-GT(M) OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., Chief District Judge, Presiding

Argued and Submitted
May 9, 1991 – Pasadena, California

Filed December 20, 1991

Before: Thomas Tang, Stephen Reinhardt and
Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

ERISA

Affirming a district court grant of summary judgment, the court of appeals held that an employee's state fraud claim against his previous employers was preempted by ERISA.

Appellant Roger Olson brought a state claim for fraud against his previous employers, alleging that the level of benefits he would receive upon retirement was misrepresented to him at the time the company he worked for was sold to another company. The district court granted summary judgment for the employers, ruling that Olson's state law fraud claim related to an employee benefit plan preempted by ERISA.

COUNSEL

Norman Allenby, Hillyer & Irwin, San Diego, California, for the plaintiff-appellant.

William V. Whelan, Gray, Cary, Ames & Frye, San Diego, California and Mark S. Pulliam, Latham & Watkins, San Diego, California, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

Roger Olson appeals the district court order granting summary judgment in favor of General Dynamics, Allied-Signal, Science Applications International Corporation ("SAIC"), and SAIC Range Systems (collectively, "the appellees"). The district court ruled that Olson's state law fraud claim relates to an employee benefit plan, and is therefore preempted by § 514(a), 29 U.S.C. § 1144(a), of the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. §§ 1001 *et seq*. The court also refused to grant Olson declaratory relief under 28 U.S.C. § 2201, holding that to formulate a federal common law remedy would defeat the purpose of the scheme Congress created in ERISA. Olson challenges both of these rulings in this appeal. The district court had jurisdiction under 29 U.S.C. § 1132(e), and we have jurisdiction under 28 U.S.C. § 1291. We affirm.

BACKGROUND

Roger Olson was an employee with the Range Systems product line of General Dynamics from July 1955 until April 1986, at which time General Dynamics sold that line to Amex Systems, Inc., a subsidiary of Allied-Signal Inc. At the time of the sale, executives of both General Dynamics and Amex told Olson and the other Range Systems employees that they would be offered jobs with Amex, and General Dynamics promised Amex that it would not attempt to rehire any of those employees for a two-year period following the sale. This case is based upon the following statement made by the President of

Amex to the Range System employees at the time of the sale (and before Olson decided to accept Amex' job offer): "I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to [sic] your present position."

Olson accepted the job with Amex in April 1986. In January 1988, Amex sold the Range Systems product line to SAIC, where Olson worked until his retirement in June 1988. Olson participated in the employee benefit plan while he was employed by each of these three companies – General Dynamics, Amex and SAIC. Olson claims that the benefits he received upon retirement from SAIC were less than he would have received had he retired from General Dynamics.

Olson filed suit in state court against General Dynamics, Amex and SAIC, alleging that the level of benefits he would receive upon retirement was misrepresented to him at the time Range Systems was sold by General Dynamics to Amex. The defendants removed the case to federal court and moved for summary judgment on the first amended complaint. The district court granted the motion on the ground that Olson's fraud claim is preempted by ERISA. The district court order reads in part:

> The court finds that plaintiff's fraud claim is preempted by ERISA. A state claim, in this case a claim of fraud, is preempted if it relates to the employee benefit plan. "The phrase 'relates to' [is] given its broad common-sense meaning, such that a state law 'relates to' a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Pilot*

Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549, 1553 (1987).

> . . . Olson's claim relates to the benefit plan: he is claiming as a plan participant at AMEX or as a past participant at General Dynamics that he should be receiving a level of benefits which he is not. There is no allegation that he has been denied any benefits due him under either plan.

ER ex. 39 at 2-3. After distinguishing two Ninth Circuit cases upon which Olson relies, the district judge wrote:

> [Olson] is suing as a participant in the AMEX plan who doesn't like the level of benefits and believes that the level of benefits was misrepresented. Even if there was a misrepresentation, and the court does not find that there was one, his claim arises as a participant in both ERISA plans and consequently relates to those plans and is preempted.

Id. at 4. And in the portion of the order granting summary judgment on Olson's claim for declaratory relief, the judge ruled as follows:

> The court sees no reason to grant Olson's request for declaratory relief under 28 U.S.C. 2201, which is in essence a request to the court to devise a special remedy for Olson's fraud claim. Since the court has ruled that the fraud claim is preempted by ERISA, the court's creation of a remedy for this claim would defeat the scheme created by Congress in ERISA.

Id. at 5.[1] Olson filed a timely notice of appeal from the Order granting summary judgment.

DISCUSSION

We review a grant of summary judgment de novo. *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). We must decide, viewing the evidence in the light most favorable to the Olson, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

I.

Section 514(a) of ERISA provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Section 514(c)(1) indicates that this preemption provisions extends to all state common law causes of action – provided, of course, that they relate to an employee benefit plan. 29 U.S.C. § 1144(c)(1); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). As the Supreme Court has noted, this preemption clause is "deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern."

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[1] Olson's amended complaint also contained a cause of action for discrimination against General Dynamics under 29 U.S.C. § 1140. However, that claim was dismissed to perfect this appeal, and it is therefore not before us.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (internal quotation omitted). Consistent with that purpose, "[t]he phrase 'relate to' [is] given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 47 (internal quotation omitted). We review de novo the district court's decision that ERISA preempts Olson's fraud claim. *Nevill v. Shell Oil Co.*, 835 F.2d 209, 211 (9th Cir. 1987).

Given the Supreme Court's directive that ERISA's preemption provision is to be construed broadly, it is difficult to see how Olson's fraud claim could be found not to "relate to" an employee benefit plan. We think that the district court's conclusion that Olson's allegations "relate to" an employee benefit plan are straightforward application of the standard established by the Supreme Court. To state his claim in the most favorable manner, Olson is alleging that, upon retirement, he received benefits from Amex and SAIC that were "considerably less" than the benefits General Dynamics and Amex led him to believe he would receive. The district court ruled that this is a claim "that he should be receiving a level of benefits which he is not." Concluding that such a claim "has a connection with" and makes "reference to" a benefit plan, the judge ruled that the state law fraud claim is preempted by ERISA.

To escape this seemingly inexorable conclusion, Olson relies upon two Ninth circuit cases that he argues support his position that his fraud claim is not preempted. *Scott*, 754 F.2d 1499; *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir.), *amended*, 791 F.2d 799, *cert. denied*, 479 U.S 1018 (1986). *Scott* is easily

distinguished. Olson argues that it establishes a rule that claims for prospective benefits are not preempted by ERISA. In fact, the only reason that the claim for prospective benefits was held not to be preempted was because the company for which the plaintiff-employees worked did not have an employee benefit plan. After noting that a claim cannot "relate to" a plan that does not exist, we allowed the employees to proceed with their tort claim because it was based upon the conduct which led to the non-existence of such a plan. *Scott*, 754 F.2d at 1505-06.

Olson's reliance on *Martori* is not so easily dismissed, as there is language in that case that appears to limit significantly the reach of ERISA's preemption clause. In the course of discussing the Act's preemptive power, the Court wrote:

> The principle underlying all of the decisions would appear to be that the state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is "part of the administration of an employee benefit plan"; that is, *the state law is preempted if it regulates the matters regulated by ERISA*: disclosure, funding, reporting, vesting, and enforcement of benefit plans.

Martori, 781 F.2d at 1357-58 (emphasis added). This language suggests two arguments in support of Olson's claim that his fraud action is not preempted. First, and most obviously, Olson might argue that his claim does not relate to the administration of a benefit plan. That is, Olson could argue that he is alleging not that the plans in which he participates are being administered improperly, but that the amount of benefits he would receive under

those plans was misrepresented to him. Olson's second argument based on this passage would be that, because ERISA does not provide for a civil cause of action for alleged oral misrepresentations, his fraud claim does not "regulate matters regulated by ERISA," and therefore is not preempted.

As to the argument that Olson's allegations do not relate to the administration of an employee benefit plan, the short answer is that neither the statute nor the Supreme Court's pronouncements upon it have suggested such a requirement. Surely a claim can be said to have a "connection with" or make "reference to" a plan without it concerning the technical aspects of the plan's administration.[2] Nonetheless, the great majority of cases in which this Court and the Supreme Court have held that ERISA preempts state common law claims have involved situations where the plaintiff alleged that plan administrators were not providing benefits in accordance with the terms of the plan. *See Pilot Life*, 481 U.S. 41; *Metropolitan Life*, 481 U.S. 58; *Davidian v. So. Calif. Meat Cutters Union*, 859 F.2d

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[2] We note that *Martori* was decided before the two most recent Supreme Court decisions that address ERISA preemption. *Pilot Life*, 481 U.S. 41 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). While *Martori*, because of its unique factual context, is not inconsistent with those cases, it does appear to take a more narrow view of preemption. *Compare Martori*, 781 F.2d at 1359 (state law is preempted only if it "purports to regulate" ERISA plans) *with Pilot Life*, 481 U.S. at 47-48 ("we have emphasized that the preemption clause is not limited to state laws specifically designed to affect employee benefit plans") (internal quotation omitted).

134, 135 (9th Cir. 1988); *Johnson v. Dist. 2 Marine Eng. Beneficial Ass'n*, 857 F.2d 514, 517-18 (9th Cir. 1988); *Nevill*, 835 F.2d at 212. If the language in *Martori* is understood to mean that a claim is preempted only if it alleges that a benefit plan is not being administered in accordance with the plan's provisions, then Olson's fraud claim may not be preempted.

To read *Martori* so broadly, however, would be to abstract from the peculiar facts of that case. The plaintiffs in *Martori*, as in *Scott*, were not even participants in the plan to which the Court found their claim did not relate. In *Martori*, the benefit plan in question was used only to measure the benefits that were awarded to union employees whose employers were found to have engaged in unfair labor practices. Because of those unfair practices, the plaintiffs did not receive the benefits that "might have been included had a contract been reached," *Martori*, 781 F.2d at 1353, and California law required the Court to look to the hypothetical "benefit package they would have received" to calculate the one-time, make-whole remedy. Understood in context, then, *Martori* does not stand for the proposition that ERISA preempts state law claims only if they relate to the nuts-and-bolts administration of a benefit plan.

Martori also suggests that ERISA only preempts state laws related to matters that ERISA regulates. Olson argues that none of the preemption categories listed in *Martori* – disclosure, funding, reporting, vesting, and enforcement of benefit plans – cover his claim that officials at General Dynamics and Amex misrepresented to him the level of benefits he would receive in his new job. A closer examination of *Martori*, however, reveals that

Martori does not support Olson's position at all. While *Martori* espouses a narrow viewpoint on preemption, Olson's case falls directly under a category of cases which *Martori* acknowledges have traditionally been preempted by ERISA. 781 F.2d 1356-57 & n. 19 ("laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan" are pre-empted by ERISA, including fraud claims).

In addition, the appellees respond that ERISA does regulate such a claim by providing a civil remedy to plan participants; they point to § 502(a)(1)(B), which provides: "A civil action may be brought – (1) by a participant . . . – (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 3(7) of ERISA defines a participant as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). At the time he filed this suit, Olson was therefore a "participant" in each company's employee benefit plan, and he had the option of bringing a suit under § 502(a)(1)(B).

At the same time, however, the appellees concede that ERISA's civil remedy probably does not extend to claims of oral misrepresentation regarding the level of benefits provided by a plan. If the Court in *Martori* was correct in stating that ERISA only preempts laws that regulate matters regulated by ERISA, and if ERISA does not provide a remedy for one in Olson's position, then his

claim is not preempted.[3] But neither this Court nor any other of which we are aware has ever adopted such a narrow reading of ERISA's preemption clause. As the Supreme Court wrote in *Pilot Life*:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

481 U.S. at 54. There is simply no reason to assume that Congress intended ERISA's preemptive reach to be coextensive with the Act's civil remedial scheme. The Eleventh Circuit has addressed this precise question in a case closely analogous to the present one:

> The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit the actions formerly prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based.

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[3] It is important to emphasize that Olson has not asserted a claim under § 502(a)(1)(B), ERISA's civil remedial scheme. That cause of action is discussed here only to address the argument that Olson has no remedy available to him if his fraud claim if preempted by ERISA.

Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). We agree with the Eleventh Circuit that any such gap is the concern of Congress, and so we affirm the district court's ruling that Olson's fraud claim "relates to" an employee benefit plan, and is therefore preempted by ERISA.

II.

Olson's complaint also contains a cause of action requesting the court, should it find the fraud claim to be preempted by ERISA, to "devise a federal common law remedy applicable to OLSON's circumstances." As indicated above, the district court declined this invitation, holding that to do so "would defeat the scheme created by Congress in ERISA." We review de novo the district court's denial of declaratory relief. *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986). For the reasons already discussed regarding the interplay between ERISA's preemption provision and its remedial scheme, we agree with the district court that to devise a federal common law remedy for Olson's claim would defeat the scheme created by Congress in ERISA. The district court properly denied Olson's request.

CONCLUSION

Because we agree with the district court that Olson's fraud claim relates to an employee benefit plan, and is therefore preempted by ERISA, the order granting the appellees' motion for summary judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROGER OLSON, Plaintiff, v. GENERAL DYNAMICS CORPORATION, a foreign corporation, ALLIED SIGNAL INC., a foreign corporation, AMEX SYSTEMS CORPORATION (a wholly owned subsidiary of Allied Signal, Inc.), SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, a foreign corporation, AMEX SYSTEMS INC. (a wholly owned subsidiary of Science Applications International Corporation), SAIC RANGE SYSTEMS, a California corporation and DOES 1 through 50 inclusive, Defendants.	Case No. 89-0789-GT(M) MEMORANDUM DECISION AND ORDER (Filed Mar. 20, 1990)

The motion for summary judgment of defendants Allied-Signal Inc., Science Applications International Corporation, and SAIC Range Systems and the motion to dismiss of defendant General Dynamics came on for hearing before the Honorable Judge Gordon Thompson, Jr. on February 5, 1990. Matthew L. Lalli of Latham & Watkins appeared on behalf of defendants and moving parties Allied-Signal Inc., Science Applications International Corporation, and SAIC Range Systems; Michael C. Sullivan

of Gray, Cary, Ames & Frye appeared on behalf of defendant General Dynamics Corporation; and Norman R. Allenby of Hillyer & Irwin appeared on behalf of plaintiff. The court having reviewed the pleadings, exhibits, declarations, and arguments in favor and in opposition to the motions hereby grants the motion for summary judgment and the motion to dismiss as to the fraud claims and the claim for declaratory relief with prejudice. General Dynamic's motion to dismiss as to the claim of discrimination under Title I, §510 of ERISA, at 29 U.S.C. §1140 is denied.

Plaintiff Olson was a long time employee of defendant General Dynamics. In March 1986, at the time that Olson was working as an engineer in General Dynamics' Range Systems division, General Dynamics sold that division to defendant Allied Signal, Inc. Officials of Allied's Subsidiary, AMEX, and General Dynamics held a meeting before the final sale date with Olson and other employees to explain the sale and its impact on their employment.

Olson brings a fraud claim against General Dynamics and Allied-Signal, arguing that they fraudulently induced him into believing that his benefits would be the same at AMEX as they were at General Dynamics. He also pleads a discrimination claim against General Dynamics under Title I, §510 of ERISA, 29 U.S.C. §1140, and makes a request for declaratory relief.

The court finds that plaintiff's fraud claim is preempted by ERISA. A state claim, in this case a claim of fraud, is preempted if it relates to the employee benefits plan. "The phrase 'relates to' [is] given its broad common-sense meaning, such that a state law 'relates to' a

benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1553 (1987).

Numerous courts under similar facts have held fraud claims preempted by ERISA. *See Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied* 481 U.S. 1016 (1987), *Straub v. Western Union Telegraph Co.*, 851 F. 2d 1262 (10th Cir., 1988). Olson's claim relates to the benefit plan: he is claiming as a plan participant at AMEX or as a past participant at General Dynamics that he should be receiving a level of benefits which he is not. There is no allegation that he has been denied any benefits due him under either plan.

Plaintiff cites to numerous Ninth Circuit cases for the proposition that a fraud claim is not preempted, but the court finds these cases distinguishable. In *Martori Brothers v. James-Massengale*, 781 F. 2d 1349 (9th Cir. 1986), plaintiffs were seeking to collect damages awarded them by the California State Agricultural Labor Relations Board. The damages had been calculated partially on the basis of foregone benefits. This case can be distinguished, as plaintiffs were seeking to enforce a peculiar and distinct state right – a finding of a state administrative agency. The court held that the ALRB "make whole" orders "affect the [ERISA] plans in too remote, tenuous and peripheral a manner to justify a holding that they 'relate to' the plans." *Id* at p. 1359.

In *Scott v. Golf Oil Corp.*, 754 F. 2d 1499 (9th Cir. 1985) the court found no ERISA preemption of a fraud claim on facts similar to the instant case. However, the holding in *Scott* is not controlling, as the reasoning of the court was

limited to the facts of that case. In *Scott*, plaintiffs alleged that Gulf Oil, who sold a refinery to Thrifty Oil, represented to them that there would be severance pay benefits at Thrifty, when in fact Thrifty had *no* severance pay benefits plan. Plaintiffs were entitled to sue for prospective benefits because they were not "participants in or beneficiaries of, a severance pay plan administered by Thrifty," *Id* at 1505. Therefore, they could not sue under ERISA's civil enforcement provisions, and would have had no redress for their grievance if the fraud claim was held to be preempted.

Unlike *Scott*, in the instant case Olson has not pointed to any particular benefits promised by General Dynamics or Allied-Signal which he has not received at AMEX *at all*. He is suing as a participant in the AMEX plan who doesn't like the level of benefits and believes that the level of benefits were misrepresented. Even if there was a misrepresentation, and the court does not find that there was one, his claim arises as a participant in both ERISA plans and consequently relates to those plans and is preempted.

Olson also claims that General Dynamics discriminated against him in the sale of the division in violation of ERISA at 29 U.S.C. §1140. This section states "It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan." To make out a prima facie case of discrimination

under ERISA §510, the plaintiff must show some prohibited employer conduct taken for the the [sic] employee may become entitled. *Gavalik v. Continental Can Company*, 812 F. 2d 834, 852 (3d Cir. 1987).

In his first amended complaint, Olson alleges that a majority of the professional and supervisory employees in his division at General Dynamics were close to retirement age. He claims that General Dynamics selected this division for sale because it wanted to avoid the cost of retirement benefits, and intentionally crafted the terms of the contract of sale with AMEX so as to avoid any future liability for the retirement benefits of these senior employees.

Because of the standard the court must apply, this claim cannot be dismissed on this motion. A complaint should not be dismissed unless it is clear that no set of facts in support of plaintiff's claim would entitle him to relief. *Mack v. South Bay Beer Distributors, Inc.*, 798 F. 2d 1279, 1282 (9th Cir. 1986). In considering a motion to dismiss, the court is to presume that all facts alleged in the complaint are true. *McRorie v. Shimoda*, 795 F. 2d 780, 783 (9th Cir. 1986). Presuming these facts to be true, Olson has sufficiently alleged that General Dynamics sought to sell the division to avoid paying retirement benefits.

The court sees no reason to grant Olson's request for declaratory relief under 28 U.S.C. §2201, which is in essence a request to the court to devise a special remedy for Olson's fraud claim. Since the court has ruled that the fraud claim is preempted by ERISA, the court's creation of a remedy for this claim would defeat the scheme

created by Congress in ERISA. Therefore, the motion for summary judgment and the motion to dismiss as to this cause of action are granted.

IT IS SO ORDERED.

Dated: 20 MAR 1990

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.,
Chief Judge
United States District Court

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United States District Court

SOUTHERN **DISTRICT OF** CALIFORNIA

ROGER OLSON

V.

GENERAL DYNAMICS, et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 89-0789GT(M)

(Filed March 21, 1990)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED grants motion for summary judgment and motion to dismiss as to this cause of action.....

March 21, 1990
Date

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Clerk

Monique J. Chappel
(By) Deputy Clerk

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROGER OLSON, Plaintiff, v. GENERAL DYNAMICS CORPORATION, a foreign corporation, ALLIED SIGNAL INC., a foreign corporation, AMEX SYSTEMS CORPORATION (a wholly owned subsidiary of Allied Signal, Inc.), SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, a foreign corporation, AMEX SYSTEMS INC. (a wholly owned subsidiary of Science Applications International Corporation), SAIC RANGE SYSTEMS, a California corporation and DOES 1 through 50 inclusive, Defendants.	CASE No. 89-0789-GT(M) NOTICE OF APPEAL (Filed Apr. 20, 1990)

NOTICE IS HEREBY GIVEN that ROGER OLSON, Plaintiff above-named, having dismissed without prejudice has second claim for relief, appeals to the Court of appeals for the Ninth Circuit from that judgment entered in this action on March 23, 1990, disallowing his fraud claim and request for declaratory relief against GENERAL DYNAMICS and ALLIED SIGNAL CORPORATION (AMEX SYSTEMS, INC.), SCIENCE APPLICATIONS INTERNATIONAL CORPORATION and SAIC RANGE SYSTEMS.

DATED: April 20, 1990

HILLYER & IRWIN

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER OLSON, Plaintiff-Appellant, v. GENERAL DYNAMICS CORPORATION, a foreign corporation; ALLIED SIGNAL, INC., a foreign corporation; AMEX SYSTEMS CORPORATION, (a wholly owned subsidiary of Allied Signal Inc.); SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, a foreign corporation; SAIC RANGE SYSTEMS, a California corporation and DOES 1 through 50 inclusive, Defendants-Appellees.	No. 90-55688 D.C. No. CV-89-0789-GT(M) ORDER (Filed Jan. 24, 1992)

Before: TANG, REINHARDT, and WIGGINS, Circuit Judges

Appellant's petition for rehearing is DENIED.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * *

28 U.S.C. § 158

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges provided a bankruptcy judge may not hear an appeal originating within a district

for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

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29 U.S.C. § 1001

SUBTITLE A – GENERAL PROVISIONS

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of

the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1101

§ 1101. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall –

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide –

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(l) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

28 U.S.C. § 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE – Continued

CHAPTER 89 – DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

[See main volume for text of (b) [A31]*]*

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may[1] may [sic] remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon

removal the action shall be tried by the court without jury. Where removal is based upon this subsection the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

HOUSE OF REPRESENTATIVES

93D CONGRESS) REPORT
1st. Session) No. 93-533

EMPLOYEE BENEFIT SECURITY ACT OF 1973

OCTOBER 2, 1973. – Committeed to the Committee of the Whole House on the State of the Union and ordered to be printed

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MR. PERKINS from the committee on Education and Labor, submitted the following

REPORT

together with

SUPPLEMENTAL, ADDITIONAL, AND INDIVIDUAL VIEWS

[To accompany H.R. 2]

The Committee on Education and Labor, to whom was referred the bill (H.R.2) to revise the Welfare and Pension Plans Disclosure Act, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass. The amendment substitutes all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

I. SYNOPSIS

The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the

private retirement system which limit the effectiveness of the system in providing retirement income security. The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant. In broad outline, the bill is designed to:

(1) establish equitable standards of plan administration;

(2) mandate minimum standards of plan design with respect to the vesting of plan benefits;

(3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities;

(4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and

(5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

Provision is made for the imposition of criminal penalties on those willfully violating their duties under the Act. The Labor Department is given primary authority to

administer the provisions of the Act, but the Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries.

II. Background

The private pension system is a relatively modern economic institution tracing its role as an important social and economic factor only from the mid 1940's. A variety of converging financial and social trends in our society have created a favorable environment for the growth and expansion of private deferred compensation schemes and retirement programs in general. As our economy has matured, an ever increasing number of employers have recognized their responsibility for the physical and economic welfare of their employees, even for the years beyond retirement. Its development parallels and is a response to the transition of the American life style from its rural agrarian antecedents into is present urbanized, wage earner society. The dynamic asset growth necessary to meet its responsibilities has placed the private pension system in a position to influence the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security.

The growth of the private pension movement in the United States proceeded slowly until the years preceding World War II. As the full implications of the economic changes sweeping the nation were felt, American beliefs and attitudes regarding retirement security changed. The

passage of the Railroad Retirement Act and the Social Security Act marked the turning point in American thinking, and dissatisfaction with those early governmental programs contributed to an accelerated interest in private retirement plans. The wage freezes imposed during World War II and the Korean conflict focused increased attention on the deferred component of compensation as a means of avoiding the freeze restrictions.

In 1947 a series of administrative proceedings and court decisions under the National Labor Relations Act of 1935 held that pensions were a form of remuneration for the purpose of the Act, and they accordingly became mandatory subjects of collective bargaining. (Inland Steel Company v. NLRB, 170 f.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949)). In the same time period a Presidential fact finding commission in presenting its report on the steel industry labor dispute in 1949 stated that:

> We think all industry in the absence of adequate Government programs, owes an obligation to workers to provide for maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old age retirement – in the same way as it now does for plant and machinery.

In 1940, an estimated four million employees were covered by private pension plans; in 1950, the figure had increased to almost 10 million and in 1960 over 21 million were covered. Currently, over 30 million employees or almost one half of the private non-farm work force are covered by these plans. This phenomenal expansion of coverage has been matched by an even more startling

accumulation of assets to back the benefit structure. Today, in excess of $150 billion in assets are held in reserve to pay benefits credited to private plan participants.

This rapid growth has constituted the basis for legislative efforts at both the federal and state levels to assure equitable and fair administration of all pension plans.

Various aspects of pension plans have been affected to some degree by most of the major labor legislation of the twentieth century, including the National Labor Relations Act (1935), the Labor Management Relations Act (1947), and the Labor Management Reporting and Disclosure Act (1959). However, not until 1958, with the enactment of the Welfare and Pension Plans Disclosure Act, was legislation effected which was specifically designed to exercise regulatory controls over pension and welfare funds. Based upon disclosure of malfeasance and improper activities by pension administrators, trustees, or fiduciaries, the Act was amended in 1962 to designate certain acts of conduct as federal crimes when they occurred in connection with welfare and pension plans. The amendments also conferred investigatory and various regulatory powers upon the Secretary over pension and welfare funds. In the decade since the amendments were enacted, experience has shown that, despite intermittent enforcement of the reporting requirements and the criminal provisions, the protection accomplished by statute has not been sufficient to accomplish Congressional intent.

The Existing Law

The growth and development of the private pension system in the past two decades has been substantial. Yet, regulation of the private system's scope and operation has been minimal and its effectiveness a matter of debate. The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private accumulation of funds which have escaped the imprimatur of effective federal regulation.

At the federal level, there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities. These are the Welfare and Pension Plans Disclosure Act (29 U.S.C. Sec. 3-1 et. seq.), the Labor Management Relations Act (29 U.S.C. Sec. 141, et. seq.) and the Internal Revenue Code I.R.C. of 1954, Secs. 401-404, 501-503).

A complete description of the federal regulation affecting the administration of private plans can be found in Interim Report of the Private Welfare and Pension Plan Study, 1971, Senate Report No. 92-634 of the 92d Congress 2d Session.

After a comprehensive investigation of abuses in the administration and investment of private fund assets. congress adopted the Welfare and Pension Plan Disclosure Act in 1958. The policy underlying enactment of this Act was purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans. The

essential requirement of the Act was that the plan administrator compile, file with the Secretary of Labor, and send to participants and their beneficiaries upon written request, a description and annual report of the plan. It was expected that the knowledge thus disseminated would enable participants to police their plans. The Act was amended in 1962 to make theft, embezzlement, bribery, and kickbacks federal crimes if they occur in connections with welfare and pension plans. The 1962 amendments also conferred limited investigatory and regulatory powers upon the Secretary of Labor, and required bonding of plan officials.

Experience in the decade since the passage of the above amendments has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. Its chief procedural weakness can be found it its reliance upon the initiative of the individual employee to police the management of his plan.

The Labor Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.

Tax deductions benefits accruing to employers are prescribed by the Internal Revenue Code under which the

employer is granted a deduction within certain limits for contributions made to a qualified plan, and the investment earnings on such plans are made tax-exempt. To attain "qualified status" under the Code, the plan must be (1) for the exclusive benefit of the participants; (2) for the purpose of distributing the corpus or income to the participants; (3) established in such a manner to make it impossible for the employer to use or divert funds before satisfying the plan's liabilities; and (4) not discriminate in favor of officers, stockholders, or highly-compensated or supervisory employees.

The Internal Revenue Code provides only limited safeguards for the security of anticipated benefit rights in private plans since its primary functions are designed to produce revenue and to prevent evasion of tax obligations. The essence of enforcement under the Code lies in the power of the Internal Revenue Service to grant or disallow qualified status to a pension plan, thus determining the availability of statutory tax advantages. The Internal Revenue Service jurisdiction and enforcement capabilities are solely to allow various tax advantages to accrue to employers who establish and maintain pension plans which can qualify for such tax benefit privileges.

In the absence of adequate federal standards, the participants is left to rely on the traditional equitable remedies of the common law of trusts. A few states, including New York, Washington, Wisconsin, Massachusetts, and California have codified existing trust principles and enacted legislation which requires in many instances a degree of disclosure similar to that required by federal statute.

The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee. In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording. Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement.

The proposed bill would, therefore, establish minimum standards of vesting, funding, and fiduciary and system of compulsory benefit insurance to protect the security of pension rights.

As suggested by the President's Cabinet Committee Report of 1965; "As a matter of equity and fair treatment an employee covered by a pension plan is entitled, after a reasonable period of service, to protection of his future retirement benefit against any termination of his employment." Concern for loss of benefits by workers after long years of labor through circumstances beyond their control was similarly expressed by President Richard M. Nixon on December 8, 1971, when, in a message to the Congress he said, "When a pension plan is terminated, an employee participating in it can lose all or a part of the benefits which he has long been relying on, even if his plan is fully vested . . . even one worker whose retirement security is destroyed by the termination of a plan is one too many."

III. Major Issues

Although the need for legislative reform has been and continues to be widely acknowledged among all persons and sectors affected, federal mandation of essential improvements has been resisted due to the belief that such legislation might impede plan growth. However, the Committee's inquiries have revealed that the costs associated with the vesting and funding proposals in the Act are sufficiently modest as not to constitute a major impediment to plan growth. Additionally, any added cost attributable to the imposition of vesting and funding standards will innure directly to the benefit of the participants in each plan in the form of increased availability of benefits and added security.

The principal issues affecting the vital and basic needs for legislation involve consideration of the essential elements of pensions:

A. VESTING

One of the major private pension plan considerations centers around the concept of vesting. Vesting refers to the nonforfeitable right of interest which an employee participant acquires in the pension fund. The benefit credits may vest in the employee immediately, although in most cases participants do not become eligible for vesting of benefits until a stipulated age or period of service, or a combination of both, is attained.

Upon compliance with the basic requirement of age or service, many plans will grant their participants vested rights to those benefits earned to that time. However,

should employment terminate prior to such time, the employee will receive no benefits. Some pension plans, however, specify "graded" vesting formulas, whereby only a defined percentage of the accrued benefits earned will vest upon fulfillment of minimum requirements, and such percentage may increase periodically, as the employee continues in his employment and completes additional service.

Despite the recognized and acknowledged need for pension plans to provide for vesting of earned benefits, if pension promises are to be meaningful to workers, there is need for federal statutory requirements which will compel an employer to grant such vesting benefits. The difficulties and hardships resulting from non-existent or inadequate plan provisions for vesting of benefits have been vividly established by the Committee's studies and hearings.

It is noteworthy that in 1965, the President's Commission on Public Policy and Private Pensions, while acknowledging that there had been some improvement in private plans by increased adoption of vesting provisions, nonetheless found and recommended legislation to make minimum vesting provisions mandatory. That Commission concluded that " . . . the degree of retirement protection in private pension plans various widely and in many cases remains quite inadequate." (President's Committee on Corporate Pension Funds and other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs; A Report to the President on Private Employee Retirement Plans, January, 1965, p. 39).

The vesting concept recommended by the Cabinet Committee suggested preference for deferred graded vesting. It specifically favored a vesting formula under which 50 percent of an accrued pension would be vested in a plan participant upon completion of 15 years of service, with rights to full vesting of accrued pension credits to occur after 20 years of service. In general, although there has been some discernible progress to permit early vesting of benefits to employees, some employers incline to defer such vesting until the employee reaches a normal or early retirement eligibility formula. This is essentially based upon the belief that it will discourage and deter such employee from leaving the job before reaching retirement age.

Despite claims by opponents that progress made in pension plan provisions to provide vesting manifest movement toward an eventual voluntary vesting system, plans involving substantial numbers of workers which contain no vesting are still not uncommon. Opponents of mandatory vesting believe that compulsory vesting provisions will discourage development of new plans and impede flexibility and latitude in formulating employee benefits because of excessive costs that are certain to result. However, in the face of Committee findings relative to projected costs to plans for imposed vesting, indications are that the resistance of opponents to universal vesting is essentially structured upon extreme reluctance to submit to governmental regulatory measures concerning pension plan administration and operations. In its final analysis, the issue basically resolves itself into whether workers, after many years of labor, whose jobs

terminate voluntarily or otherwise, should be denied benefits that have been placed for them in a fund for retirement purposes.

B. FUNDING

Another major issue in private pension plans relates to the adequacy of plan funding. "Funding" refers to the accumulation of sufficient assets in a pension plan to assure the availability of funds for payment of benefits due to the employees as such obligations arise. Today, funding of pension plans for the limited and specific purpose of qualifying for tax benefits permitted by law for contributions made is governed by statutory and regulatory requirements which are under the jurisdiction of the Internal Revenue Service (I.R.S. Code of 1954, Sections 401-404). The minimum funding rules (Treasury Regulations, Sections 1.401-404(c) (1963)) require an employer to make contributions to a pension fund, qualified by the Internal Revenue Service, of amounts at least equal to the pension liabilities being created currently, and the interest due upon those amounts of monies which reflect unfunded accrued liabilities. The inherent weakness of this required minimum funding is that the employer is not required under law to make payments toward the principal of the unfunded accrued liabilities. Without mandatory funding of past service liabilities, a pension plan may never be in a financial posture to meet its pension obligations to its employees.

The pension plan which offers full protection to its employees is one which is funded with accumulated assets which at least are equal to the accrued liabilities,

and with a contribution rate sufficient to maintain that status at all times. However, since plans are revised and amended to provide new benefits which create new and different liabilities for the plan, opponents of compulsory funding argue that it is unrealistic to expect that plans maintain a full funding status at all times. The same opposition is voiced for new plans, which invariably assume a large unfunded liability at the outset of the plan, due to the granting of credit for past service by employees of the employer.

The ineffectiveness of funding requirements was acknowledged in the President's Cabinet Committee Report of 1965, when it concluded that " . . . the minimum standards for funding under present tax law do not assure adequate funding. The setting of standards for adequate funding therefore becomes an important public concern." (Public Policy and Private Pension Programs, 1965, pp.50-51). The promise and commitment of a pension can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a promise of a pension may be illusory and empty.

C. FIDUCIARY RESPONSIBILITY AND DISCLOSURE

Another area of concern of the Subcommittee has involved the conduct of administration and operations of pension plans. Of particular interest has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of persons who should be deemed pension "fiduciaries," and the standards of accountability they shall be governed by in

the management and disposition of pension funds. The only current federal requirement is that the Secretary of Labor require fiduciaries, trustees, etc., to make disclosure of the provisions and financial operations of the pension plan under the Welfare and Pension Plans Disclosure Act.

An important issue relates to the effectiveness of communication of plan contents to employees. Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

IV. Committee Studies and Activities

The General Subcommittee on Labor, pursuant to House Resolution 225, 93d Congress, February 20, 1973 and a prior resolution from the 92d Congress, has conducted a comprehensive and exhaustive study of the private pension system in the United States, with particular emphasis on the impact which such plans have upon the workers covered. The Subcommittee's implementation of the House Resolutions has been a methodical collection and analysis of vital statistics and information

from individual and group cases reflecting the internal administration and operations of private pension and welfare plans. An interim staff report was issued in April of 1972 and an in-depth analysis of the cost of vesting proposals was published in February of 1973. During February, March, April and May over twenty days were devoted by the Subcommittee to taking testimony on pension reform issues. These hearings were conducted in Washington, D.C., Pittsburgh, Pennsylvania, Waterbury, Connecticut, Chicago, Illinois, South Bend, Indiana, Seattle, Washington, Honolulu, Hawaii, and San Francisco, California.

Because of the Subcommittee's concern for the cost impact of mandated vesting requirements, an outside consultant, Dr. Howard Winklevoss, Associate Professor of Insurance at the Wharton School of Finance, was retained to prepare an analysis of the various vesting cost proposals. This analysis utilized the computer facilities of both the Wharton School and the House. The complete text of this analysis was published in February 1973.

V. Committee Action

The Committee endorses the concept of a comprehensive private pension reform program. It believes that expeditious enactment of H.R. 2 will institute a program which will achieve a strengthening of the role played by private retirement plans within the fabric of our economic and social structures. Its most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of

life will be lacking in the necessities to sustain them as human beings within our society. The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers.

The Committee believes that the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system. At the same time, the Committee recognizes the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many.

The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations. In adopting this approach, the Committee believes it has designed a bill, which, like the National Labor Relations Act, the wage-hour laws and other labor standards laws, brings the workers' interests

up to parity with those of employers. This legislation strikes an appropriate and equitable balance between two opposing schools of thought – those who advocate complete and stringent control of private pensions and those who oppose any form of government supervisory or regulatory control.

The Act does provide for coverage of public employee plans under Title I but excludes them from the other substantive provisions. The committee is convinced that legislation seeking reform in the public sector must proceed with a thorough study of the effects of such proposals. These are literally thousands of public employee retirement systems operated by towns, counties, authorities and cities in addition to the state and Federal plans. Eligibility, vesting, and funding provisions are at least as diverse as those in the private sector with the added uniqueness added by the legislative process. For this reason the Committee is convinced that additional data and study is necessary before any attempt is made to address the issues of vesting and funding with respect to public plans.

The Committee on Education and Labor offered, H.R. 2 reported unanimously on September 25, 1932.

ESTIMATE OF COSTS

In accordance with clause 7 of Rule XIII the Committee estimates that the projected cost of administering this act will not exceed that amount currently being expended for the present act.

VI. Committee Views

POLICY OF "EMPLOYEE BENEFIT SECURITY ACT"

Underlying the provisions of this Act is a recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, or the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut downs and plan terminations, adequate communication to participants, and, in short, the establishment of certain minimum standards to which all private pension plans must conform if the private pension promise is to become real rather than illusory.

DEFINITIONS

The Committee has the following technical notes concerning definitions:

The definition of "employee" is intended to encompass any person who has the status of an "employee" under a collective bargaining agreement.

The exclusion of assets of investment companies regulated under the Investment Company Act of 1940 from the definition of "fund" is not intended to exclude participating shares in an investment company held by the fund.

With respect to the term "profit-sharing retirement plan", it is intended that stock bonus, thrift and savings or similar plans with retirement features be treated as the equivalent of profit-sharing retirement plans for purposes of this Act unless expressly indicated otherwise.

With respect to the term "normal service cost", it is intended that this definition be applied consistent with such cost methods recognized by the Internal Revenue Service unless there is an effort to avoid or evade the funding requirements of this Act.

With respect to the term "non-forfeitable right" or "vested right", it is not contemplated that vesting be required in benefits such as death benefits, disability benefits, or other forms of ancillary benefits provided by the plan. The plan may, of course, at its option, provide for vesting in such benefits.

With respect to "adequate consideration," it is intended that this term be read to include the fair market value of the use of leased property.

In formulating the definition of "multi-employer plan" the Committee was guided by the concept that such a plan, if sufficiently comprehensive in size or scope, would be unlikely to terminate because its existence did not depend on the economic fortunes of one employer or employer entity. The Committee recognized that certain single employer plans have characteristics similar to those of the multi-employer type described in the definition, but, on balance, it is believed that experience on plan terminations provides a reasonable basis for the distinction.

Title I – Disclosure and Fiduciary Standards

Title I represents a major departure from current law. First, by additions to and changes in the reporting

requirements designed to disclose more significant information about plans and the transactions engaged in by those controlling plan operations and to provide specific data to participants and beneficiaries concerning the rights and benefits they are entitled to under the plans and the circumstances which may result in their not being entitled to benefits. Second, by the addition of a new section setting forth responsibilities and proscriptions applicable to persons occupying a fiduciary relationship to employee benefit plans, including a "prudent man" standard for evaluating the conduct of all fiduciaries, and by barring from responsible fiduciary provisions in such plans for a period of five years all persons convicted of certain listed criminal offenses.

REPORTING AND DISCLOSURE

The underlying theory of the Welfare and Pension Plans Disclosure Act to date has been that reporting of generalized information concerning plan operations to plan participants and beneficiaries and to the public in general would, by subjecting the dealings of persons controlling employee benefit plans to the light of public scrutiny, insure that the plan would be operated according to instructions and in the best interests of participants and beneficiaries. The Secretary's role in this scheme was minimal. Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended. It was expected that the information disclosed would enable employees to police their plans. But experience has shown that the

limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan – what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

FIDUCIARY RESPONSIBILITY

A fiduciary is one who occupies a position of confidence or trust. As defined by the Act, a fiduciary is a person who exercises any power of control, management or disposition with respect to monies or other property of an employee benefit fund, or who has authority or responsibility to do so. It is not the intent of the Committee, however, that where the sole power of control, management or disposition with respect to plan funds rests with the participants themselves, as may be the case with respect to certain plans where the participant has the sole discretion over an individual account established in his

name, that such participants shall be regarded as fiduciaries. The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts. The section was deemed necessary for several reasons.

First, a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable. Predominantly, these are plans, such as insured plans, which do not use the trust form as their mode of funding. Administrators and others exercising control functions in such plans under the present Act are subject only to minimal restrictions and the applicability of present State law to employee benefit plans is sometimes unclear. Second, even where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor incldes [sic] in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settler specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though

the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

Third, even assuming that the law of trusts is applicable, without detailed information about the plan, access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act.

Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

It is to be noted that the definition of "employee benefit fund" excludes assets of an investment company regulated under the Investment Company Act of 1940 but any participating shares held by the employee benefit fund in an investment company are assets of the fund and subject to coverage under this section.

The Committee also has made provision for contributory plans to equitably distribute any surplus funds remaining on plan termination to the participants in

accordance with their rate of contribution. This requirement is applicable only after plan assets have been used to satisfy all liabilities. The Committee believes it is unfair to permit the complete recapture by employers of surplus funds in terminated contributory plans, without regard to the fact that contributions by the workers helped to generate the surplus. The Committee wishes to emphasize that while it is not passing judgment on any particular case now pending, it has concluded that equitable principles require that this particular subject be governed by a specific rule which reflects what the Committee regards as essential protection for the interests of workers in such plans.

The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section.

There follows a list of proscriptions which represent the most serious type of fiduciary misconduct which in one way or another has occurred in connection with some welfare or pension plans. While the magnitude of these improper practices is small in relation to the total number of plans in existence, the seriousness of the improper practices disclosed indicates the need for additional precautions to insure that these specific examples do not

become general conditions. The list of proscriptions is intended to provide this essential protection.

TITLE II – VESTING

Section 201 provides that no pension plan shall require, as a condition for eligibility to participate, a period of service longer than one year or an age greater than 25, whichever occurs later; however, a plan which provides 100% immediate vesting upon entry into plan, may restrict participation to those who are 30 years of age or have three years of service, whichever occurs later.

Earlier eligibility standards were considered and appeared to impose an unwarranted additional cost on plans. Additionally, the Committee believes on the basis of substantial evidence presented that until age 25 a large portion of the work force is still transient and accounting for such employees would impose unduly burdensome and costly record-keeping requirements on plan administrators. The Committee believes that an age 25 entry standard approaches the norm for the majority of plans today.

The exception for plans which provide 100% full vesting upon plan entry is based on the fact that such plans, like the TIAA-CREF plan for college teachers, provide earlier vesting in larger amounts than provided under the bill, and requiring such plans to install earlier membership requirements would impose burdens well beyond the minimum standards approach intended by the Committee, and might compel such plans to sacrifice immediate full vesting on plan entry.

The Act presumes that promised pension benefits are in the form of a conditional deferred wage. While popular attention focuses on the deferred wage aspect of pensions, the Act recognizes that the pension promise is conditional upon completion of minimum periods of service. The imposition of equitable standards to limit the conditions precedent to receipt of pension rights will eliminate most of the situations where workers have lost out on their pensions.

The alternative vesting standards provided for under the bill should impact individual participants on a roughly equivalent basis. The potential for manipulation by carefully shopping for the most stringent standard to limit the incidence of vesting is considered to be modest. In all cases some vesting will occur no later than 10 years after initial employment and full vesting will occur between the 10th and 15th year of employment.

The Committee has endorsed a major innovation which provides for retrospective credit in accrued benefits attributable to service rendered prior to the effective date of the vesting provisions.

Title III – Funding

The Committee believes that actuarially sound funding procedures are indispensable to effective implementation of the purposes of the Act. If employers never went out of business or terminated pension plans before they were completely funded, there would, no doubt, be no persuasive justification for funding standards aside from whatever tax considerations might be applicable. Nevertheless, employers do experience financial or economic

difficulties or they undergo varying degrees of corporate reorganization, all of which can lead to premature termination of underfunded plans. A plan termination insurance program provides the essential safeguard to the rights of workers who are trapped by these unforeseen economic hazards but such a program cannot be made practical without being coupled to required standards of funding. To create a plan termination insurance program without appropriate funding standards would permit those who present the greatest risk in terms of exposure to benefit at the expense of employers who have developed conscientious funding programs. The funding standards contained in the Act are designed to lessen that unnecessary exposure by requiring every plan to be funded in a manner which will fully amortize unfunded liabilities.

The basic rights granted by the imposition of vesting standards are of real benefit to the participant only to the extent that adequate provision is made to pay the benefits when due. The vesting standards may be viewed as controlling the volume of the benefit promises made by the plan and the funding provisions as controlling the quality of those promises. The Act recognizes as a basic principle that defined benefit pension plans must be funded on some regular and current fashion. All current accruals of benefits based on current service are required to be paid for immediately. To the extent that a plan has offered benefits not based on current service, i.e. past service credit, the present value of such benefits is required to be amortized over a period of time not to exceed 40 years, but over a shorter time period (not less than 30 years) if

the average period remaining until retirement is very short.

TITLE IV – PLAN TERMINATION INSURANCE

Section 401. – Establishment and Applicability of Program

The bill reported by the Committee requires plan termination insurance to cover unfunded vested liabilities incurred prior to, as well as subsequent to, enactment of the Act, in order to prevent employees from being deprived of insurance protection for retirement credits earned before enactment.

The Secretary may provide insurance to plans to cover unfunded vested liabilities of a plan not subject to the Act so long as there is compliance with the vesting, funding and other requirements of the Act and the plan pays the requisite assessments and premiums. This is intended to make insurance coverage under the Act available on a voluntary basis to plans not subject to the Act.

Section 403. – Assessments and premiums

The Committee adopted a provision which requires an initial three-year premium to be paid by the plan, as follows:

(a) For funded vested liabilities incurred after enactment – 0.2 percentum of unfunded vested liabilities;

(b) For unfunded vested liabilities incurred prior to enactment – 0.2 percentum of unfunded vested liabilities provided the plan was 75 percent funded during the five-year

period preceding Act, or if the plan is less than five years old on date of enactment, and if it was reducing unfunded vested liabilities at rate of five percent each year;

(c) For unfunded vested liabilities incurred prior to Act, but where the funding tests above in (b) have not been met – more than .4 percentum and not less than 0.2 percentum of such unfunded vested liabilities;

(d) As to multi-employer plans, both as to unfunded vested liabilities incurred before or after Act – not to exceed 0.2 percentum of all such unfunded vested liabilities.

In order to minimize the risk of shifting to the reinsurance program substantially all unfunded liabilities created prior to enactment, it was believed essential to create two classes of risks for purposes of setting the premium rate. If the plan was being funded in an adequate fashion, i.e., was 75 percent funded or was amortizing unfunded vested liabilities at the rate of five percent each year, it was believed that such a plan was an acceptable risk and the .2 percentum premium rate was appropriate. In the event the plan did not meet the test of funding adequacy, as indicated, it falls in the category of being a higher risk and therefore, can be charged up to twice the amount of normal premium, but no more. Since multi-employer plans, as defined in the bill, have a much lower risk of plan termination, it was believed appropriate to continue charging the .2 percent premium regardless of when the unfunded vested liabilities were incurred.

Section 404. – Payment of Insurance

There are a variety of circumstances under which pension plans terminate. In some cases, the termination proceeds by stages. In other cases, it may happen fairly rapidly. In order to carry out the purpose of the reinsurance program while at the same time protecting the program from undue exposure owing to delays, manipulation, or unforeseen economic hazards following plan termination, the Secretary is provided with sufficient flexibility to determine the most appropriate procedure for winding up terminated plans and assuring effective implementation of the insurance program.

It is also required that plans furnish to the Secretary adequate prior notice of intent to terminate the plan. Persons responsible for giving such notice who fail to do so, or who terminate plans in order to circumvent or avoid the Act, are held personally liable for losses sustained by the insurance program.

Section 405. – Recovery

The Committee recognizes that in order to provide adequate protection to employees against loss of vested benefits owing to premature plan termination, it is necessary for the insurance program to cover all forms of plan termination regardless of the circumstances giving rise to the termination. The Committee also recognized that some degree of employer liability was essential where the employer was not insolvent at the point of plan termination in order to preclude abuse by shifting the financial burden to the plan termination insurance program

despite the fact that the employer had available funds to continue funding the plan.

One approach to this problem would be to require financially responsible employers to, in effect, act as self-insurers for the unfunded vested liabilities and those who are not financially responsible to obtain plan termination insurance. This approach, which is supported by precedent in the field of workmen's compensation, for example, was considered and rejected because of the potentially enormous liabilities involved. To require the Secretary to evaluate the financial capabilities of particular employers to assume such potentially enormous liabilities might have an adverse effect on the employer's competitive position and on his continued healthy growth.

Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The Committee had concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.

Accordingly, the Committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.

In addition, as a result of plan termination field hearings held by the Subcommittee, numerous instances were disclosed where acquiring companies that terminated pension plans failed to take over the liability for vested benefits owed to the employees of the predecessor company. Since this circumstance could also arise in connection with the reinsurance provision, it is necessary to strengthen the reinsurance provisions by requiring successors-in-interest to be liable for reimbursements owned by predecessor companies.

In order to make the liability of the employer for reimbursement of insurance paid meaningful, it was considered essential to provide a mechanism for enforcement of such liability through giving the government a lien on employer property for unpaid amounts due.

With respect to the Secretary's authority to treat portions of multi-employer plans as terminated for purposes of applying the plan termination insurance provisions, it should be noted that the contributing employers in such arrangements are free to arrange indemnification agreements among themselves in connection with the plan's application for insurance coverage under Title IV, so that employer liability for reimbursement of insurance paid under Title IV can be allocated under terms that the parties themselves have agreed to as equitable.

Title V – Enforcement

The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or

preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants. For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court.

Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. As indicated previously, however, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired.

The Act makes it unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan or the Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan or the Act.

The Act makes it a criminal offense for any person to use fraud, force, or violence or threats thereof to restrain, coerce, intimidate or attempt to restrain, coerce, intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, or the Act.

Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse form being carried out and in order to completely secure the rights and expectations brought into being by this legislation.

VII. Section-by-Section Analysis

PURPOSES

The Employee Benefit Security Act is designed (1) to establish minimum standards of fiduciary conduct for Trustees, Administrators and others dealing with retirement plans, to provide for their enforcement through civil and criminal sanctions, to require adequate public disclosure of the plan's administrative and financial affairs, and (2) to improve the equitable character and soundness of private pension plans by requiring them to: (a) vest the accrued benefits of employees with significant periods of service with an employer, (b) meet minimum standards of funding and (c) guarantee the adequacy of the plan's assets against the risk of plan termination prior to completion of the normal funding cycle by insuring the unfunded portion of the benefits promised.

Section 2. Findings and declaration of policy

Section 3. Definitions:

1. Employee Welfare Benefit Plan
2. Employee Pension Benefit Plan
3. Employee Benefit Plan (or Plan)
4. Employee Organization
5. Employer
6. Employee
7. Participant
8. Beneficiary
9. Person
10. State
11. Commerce
12. Industry or Activity Affecting Commerce
13. Secretary
14. Party in interest
15. Relative
16. Administrator
17. Separate Account
18. Adequate Consideration
19. Nonforfeitable (Pension Benefit or Right)
20. Security
21. Fiduciary
22. Regular Retirement Benefit

23. Accrued Portion of the Regular Retirement Benefit
24. Regular Retirement Age
25. Vested Liabilities
26. Current Value
27. Present Value
28. Investment Company not a Fiduciary
29. Normal Service Cost
30. Present Value of an Annuity Certain
31. Accrued Liability
32. Multi-Employer Plan
33. Unfunded Accrued Liability
34. Advanced Funding Actuarial Cost Method (Actuarial Cost Method)

TITLE I — FIDUCIARY RESPONSIBILITY AND DISCLOSURE

Section 101. Coverage

Title I would cover all private employee benefit plans under Commerce Clause jurisdiction except:

1. Plans of the Federal government;

2. Plans required under workmen's compensation, unemployment compensation, and disability insurance laws;

3. Plans established or maintained outside the United States for the benefit of non-United States citizens;

4. Unfunded deferred compensation schemes of top executives.

Section 102. Duty of a disclosure and reporting

The administrator of a pension or welfare plan would be required to publish to each participant or beneficiary a description of the plan as set forth in section 103 and a summary of the annual financial report as set forth in section 104. The report would be in such form and detail as the administrator finds necessary to disclose fully and fairly all pertinent facts.

Upon termination of a pension or welfare plan, the administrator would be required to file a special terminal report as prescribed by the Secretary of Labor.

Section 103. Description of the plan

Plan descriptions would be required to be published within 120 days after the establishment of a plan or within 120 days after a plan becomes subject to this title, whichever is later. Amendments to plans would have to be published within 120 days, and descriptions would have to be republished at least every five years. The description would have to be comprehensive and written in a manner calculated to be understood by the average plan participant. Among other things it would have to include: the name and address of the administrator; the schedule of benefits: a description of the plan's vesting provisions; the source of the plan's financing; and the procedures to be followed in presenting claims for benefits as well as those for appealing claims which are denied.

Section 104. Annual reports

An annual financial report to the Secretary of Labor would be required by this section for all plans. Sec. 105 provides that the Secretary shall exempt plans with less than 26 and may exempt plans with less than 100 participants. Information required in the report would include:

An audit and opinion by an independent qualified public accountant (with exceptions for public plans and when financial statements are certified by a bank or insurance carrier);

An actuarial statement of valuation (where appropriate) accompanied by a certification from the actuary preparing the valuation;

The number of employees, benefits paid, and information fiduciaries, trustees and administrators and compensation paid them;

A summary financial statement of assets and liabilities;

A summary of receipts and disbursements;

A schedule of all assets listed by issuer;

A schedule of known party-in-interest transactions;

A schedule of loans which are in default and uncollectible;

A schedule of leases which are in default and uncollectible;

A bank or insurance carrier statement of assets and liabilities for common and collective trusts.

If some or all of the plan's assets are held in common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier, the bank or carrier would also be required to file a statement of assets and liabilities.

If some or all of the benefits under the plan are provided by an insurance carrier or other organization, such report would also have to include: The premium rate or subscription charge and the total premium or subscription charges paid to each carrier and the approximate number of persons covered by each class of benefits; the total premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such carriers, or, if separate experience ratings are not kept, a statement as to the basis of a carrier's premium rate or a copy of the financial report of the carrier.

Section 105.Publication

The Secretary would be authorized to reject any report which after a hearing before him was found to be incomplete or to contain a qualified opinion by an accountant or an actuary.

A copy of the plan description and each annual report would have to be filed with the Secretary of Labor who would make them available for inspection in the public document room of the Department of Labor. The administrator would be required to make copies of the annual report and plan description as well as the bargaining agreement, and trust instrument creating the plan available for examination by any plan participant or beneficiary in the administrator's principal office, and in

such other places as necessary to fully and fairly disclose all pertinent facts.

All pension and welfare plan participants would be furnished with a copy of the plan description initially and at the time of amendment including:

A schedule of benefits;

Eligibility and vesting provisions;

Claim procedures and remedies;

Basis of financing;

Other relevant plan provisions affecting their rights and the annual report, including a summary financial statement of assets and receipts and disbursements, and the ratio of assets to value of nonforfeitable pension benefits.

Upon written request to the plan administrator, a participant could receive a copy of a statement as to his or her rights and the amount of any nonforfeitable benefit; and a copy of the plan, trust, bargaining agreement or other document. All newly vested would receive notification at the time their benefits became nonforfeitable. These copies would be furnished at the cost of reproduction.

Upon termination, all pension plan participants would receive a statement showing his or her benefits, indicating when and how they may be claimed, and including any other information affecting their rights.

A statement of a pension plan participant's right to deferred vested benefits from former pension plans would be furnished upon request to the Social Security

Administration and when action is taken on the participant's Social Security account. To assure timely filings and payment of vested benefits, the address and identity of all plans would be kept up-to-date.

Section 106.Disclosure of benefit rights to participants

The administrator is required to inform each participant when his benefits become nonforfeitable. Upon written request of any participant or beneficiary, the administrator is required to disclose the rights of that participant.

Violation of the provisions dealing with the retention of records subjects a person to a fine of up to $5,000 and/or imprisonment of up to two years. Violations of the provisions of 111(b)(2) (dealing with prohibited transactions) would subject a person to a fine of up to $10,000 and/or up to five years' imprisonment.

This section would give the Secretary of Labor authority to investigate any plan. He would be given authority to demand sufficient information as he may deem necessary to enable him to conduct his investigations.

Plan participants, beneficiaries, or the Secretary of Labor on behalf of the participants and beneficiaries would be allowed to bring civil actions to redress breaches of a fiduciary's responsibility or to remove a fiduciary who has failed to carry out his duties. The Secretary would also be empowered to bring an action to enjoin any act or practice which appears to him to violate the title. Civil actions brought by a participant or beneficiary may be brought in any court, State of Federal.

However, the Secretary would have the right to intervene in a case and remove it to a Federal district court. In any actions by a participant or beneficiary, the court could, at its discretion, allow reasonable attorneys' fees and costs of action to either party. Class actions shall be brought where requirements for class actions could be met.

Section 107.

All reports filed with the Secretary shall be public information.

Section 108.

Detailed records must be retained for six years.

Section 109.

Proven reliance upon a regulation or written interpretation by the Secretary of Labor would constitute a defense in a criminal or civil proceeding under certain sections of the act.

Section 110.

Every person subject to the fiduciary provisions of the act would have to be bonded.

Section 111. Fiduciary responsibility

This section would deem every employee benefit fund to be a trust held for the exclusive purpose of providing benefits to participants and their beneficiaries as well as defraying reasonable administrative expenses. Each plan would have to be in writing.

A fiduciary is defined in section 3 (29) as anyone who exercises any power of control, management or disposition with regard to a fund's assets or who has authority

to do so or who has authority or responsibility in the plan's administration. Fiduciaries would be required to discharge their duties with respect to the fund " . . . solely in the interest of the participants and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

A fiduciary would also have to diversify the investments, except in the case of profit-sharing, stock bonus, or thrift and savings plans, so as to minimize the risk of large losses unless under the circumstances it is prudent not to do so and in accordance with the documents and instruments governing the fund.

A fiduciary would be specifically prohibited from making the following transactions:

> Dealing with such fund for his own account . . .
>
> Acting in any transaction involving the fund on behalf of a party adverse to the interests of the plan or participants . . .
>
> Receiving personal consideration from any party dealing with the fund in connection with a transaction involving the fund . . .
>
> Transferring property to any party in interest for less than adequate consideration . . .
>
> Permitting the acquisition of property from any party in interest for more than adequate consideration.

Section 112. Pension plan termination

An equitable priority distribution of assets would be provided upon plan termination. Assets not previously allocated to individual accounts would have to be distributed according to the following priorities:

(a) Contributions by employees would be returned;

(b) those presently receiving benefits and those who could voluntarily elect to receive benefits;

(c) Those other than in (b) – to the extent of their vested benefits;

(d) All others, including the non-vested benefits of those in (c).

Benefit increases within the five years prior to plan termination would trigger an allocation based on the prior benefit formula, any remaining assets being distributed on the basis of increases in the more recent benefit formulas:

(e) Investment income attributable to employee contributions would be distributed pro rata to the employees' accounts.

(f) Any benefit liabilities incurred as a result of plan termination would be given last priority.

(g) Any remaining assets would be returned to the employer if the plan so provides; otherwise, they would be distributed pro ratably to the employees.

Section 113.

Certain persons convicted of crimes may not serve as officers, administrators, trustees, or paid consultants.

Section 114.

A 15-member Advisory Council on employee Welfare and Pension Benefit Plans would be established.

Section 115.

The Welfare and Pension Plans Disclosure Act would be repealed upon the effective date of the act, which would be six months after enactment.

TITLE II – VESTING AND ELIGIBILITY REQUIREMENTS

Section 201. Coverage

Title II would cover all private pension benefit plans including profit-sharing plans which provide benefits after retirement, except:

1. Federal, State and local plans;

2. Keogh plans benefiting the self-employed and owner-employees;

3. Plans established or maintained outside the United States for the benefit of workers who are not United States citizens;

4. Executive deferred compensation plans; and

5. Secondary plans providing class year vesting.

Section 202. Eligibility requirements

No plan, after the effective date of this title, would be allowed to require as a condition for eligibility to participate in it an age greater than 25 or a period of service longer than one year (three years for plans which provide for immediate 100% vesting or for crediting of all preparticipation service for benefit purposes), whichever is the later. Existing plans would be permitted to retain their eligibility requirements for three years or until they are amended, whichever is sooner.

Section 203. Nonforfeitable benefits

Every pension plan would be given a choice of one of three vesting rules:

1. Ten-Year Service Rule (100% vested at 10 years of covered service);

2. Graded Fifteen-Year Service Rule (30% vested at eight years of covered service, such percentage increasing by 10% each year until 100% is reached after 15 years of covered service);

3. Rule of 45 (50% vested when age plus covered service equals 45, such percentage increasing by 10% each year until 100% is reached).

The vesting rules use a fully retroactive service provision in calculating the vesting percentage and the amount of the accrued portion of the regular retirement benefit. A plan would be permitted to change vesting rules at any time if provision is made that vested benefits not reduced or delayed for participants in the plan at the time of change. A plan would always be permitted to

allow for vesting of benefits after a lesser period and in a greater amount is required under any of the three vesting rules.

Class year profit-sharing plans. – Class year plans would be required to vest 100% of the employer's contribution no later than five years after the contribution was made.

Covered service. – In computing the period of covered service under a plan, an employee's entire service with the employer contributing to or maintaining the plan shall be considered. However, service prior to age 25, service during which the employee declined to contribute to a plan requiring employee contributions, service with a predecessor of the employer contributing to or maintaining the plan (except where the plan has been continued in effect by the successor employer), service broken by periods of suspension of employment (provided the rules governing such breaks in service are not unreasonable or arbitrary), and service where a participant has previously attained a 100% nonforfeitable right may be disregarded.

Contributory plans. – No plan may provide for forfeiture (1) of any employee contributions unless agreed to in writing, or (2) of the accrued portion of the regular retirement benefit to the extent that such portion is nonforfeitable and is attributable to employer contributions.

Sections 204. Distribution of nonforfeitable benefits to terminating participants

Vested benefits to participants terminating before 65 would have to be distributed, at the option of the participant, at regular retirement age or age 65. Vested benefits

to participants terminating after age 65 would have to commence immediately at the option of the participant. Survivor annuity and other options offered by a plan to normal retirees would have to be extended to all terminated vested participants.

Social Security offset plans. Any pension plan with a Social Security offset feature would be required at the time of the first plan amendment, to provide that the amount of any offset not increase (1) for participants receiving benefits and (2) after the date of termination of a vested participant.

Section 205. Effective date

The effective date of this title would be two years after enactment. Collectively bargained plans would be extended up to 30 additional months to conform their bargaining arguments to this title.

TITLE III — FUNDING

Section 301. Coverage

Title III would cover all private pension benefit plans covered under title II except for profit-sharing and other individual account plans and unfunded voluntary fraternal type plans.

Section 302. Minimum funding standard

Every pension plan subject to title III (other than the above) must make annual minimum contributions equal to :

1. Normal cost plus no less than 30 but no more than 40-year amortization of unfunded

accrued liabilities for all plan benefits; any accumulated actuarial gains and losses would be spread over the future service of active participants;

or, if larger,

2. A percentage of the unfunded portion of the present value of the nonforfeitable pension benefits. The unfunded portion would be recalculated each year so that an interest assumption of 5% would reduce the remaining unfunded portion by about 9.2% per annum or by about 57% in 20 years or 72% in 30 years.

Contributions made in excess of the minimum could be used to offset future minimum contributions, thereby permitting funding flexibility.Required minimum contributions in excess of tax deductible limits would be permitted to be carried over to succeeding years where tax deductions would be allowed.

Section 303. Enforcement of funding requirements; variances

Application would have to be made to the Secretary for a waiver of part or all of a minimum funding contribution. Benefits could not be increased until all such waived contributions had been paid off. After five waivers in a ten-year period, the Secretary could, after notice and hearing, order the termination of the plan or the merger of the plan with another plan of the employer. Benefits could not be increased by amendment during a period of waiver.

Section 305. Effective date

The effective date of this title would be two years after enactment. Collectively bargained plans would be

extended up to 7 years to conform their bargaining agreements to this title.

TITLE IV —PLAN TERMINATION INSURANCE

Section 401.

This section establishes a Private Pension Plan Termination Insurance Program administered by the Secretary, which requires plans to insure unfunded vested liabilities incurred prior to enactment of the Act, as well as after enactment of the Act. The Secretary may provide insurance to cover unfunded vested liabilities of a plan not subject to the Act where he determines that such plan conforms to the vesting, funding and all other standards required by the Act.

Section 402. Conditions of insurance

This section requires the insurance program to insure participants against loss of vested benefits arising from plan termination.

The amount of vested benefits insurance is limited to 50 percent of highest average monthly wage of participants earned over a five year period, or $500 monthly, whichever is the lesser.

No insurance shall be paid if the plan is terminated less than three years from date of establishment or registration unless the Secretary determines that a registered plan was otherwise in substantial compliance with the Act and that the reserve position of the insurance program will not be adversely affected.

Insurance will not cover vested rights created by any plan amendment which took effect less than three years prior to plan termination.

No coverage is extended to participants who own 10 percent of more of employer voting stock.

Section 403. Assessments and premiums

This section requires plans to pay an initial uniform assessment to be prescribed by the Secretary to cover administrative costs of the program. The Secretary shall prescribe an annual premium rate based upon unfunded vested liabilities. For the first three years, the insurance premium shall not exceed 0.2 percent of unfunded vested liabilities incurred after enactment of the Act. With respect to those unfunded vested liabilities incurred prior to enactment the premium shall be 0.2 percent provided that the unfunded vested liabilities of the plan were funded at least 75% during the five-year period preceding enactment.

As to plans which on date of enactment were less than five years old, the premium shall be 0.2 percent, provided that the plan had been reducing its unfunded vested liabilities at a rate no less than 5 percent annually. In the event plans do not meet the above funding standards, they can be charged a premium not exceed 0.4 percent of less than 0.2 percent of pre-enactment unfunded vested liabilities.

Also, in the case of multiemployer plans (as defined in the Act), the premium rate for the initial three years shall not exceed 0.2 percent of unfunded vested liabilities, regardless of where such liabilities were incurred.

After the initial three-year period, the Secretary may prescribe an annual rate based upon experience, and unless Congress objects within 90 days, the new premium shall become effective.

The Secretary is required to consult with appropriate private and government agencies on matters relating to the assessment and premium rates before prescribing rates.

Section 404. Payment of insurance

This section requires that plans must notify the Secretary of intent to terminate, and failing to do so will make such persons personally liable for any losses incurred by the Pension Benefit Insurance Fund in connection with plan termination.

The insurance to be paid shall be the difference between the plan's assets and unfunded vested benefits owed at the time of plan termination.

In addition, the Secretary is required to prescribe procedures under which funds of terminated plans shall be liquidated and paid out to cover vested benefits of participants. In implementing this authority, the Secretary may transfer terminated funds under his supervision or purchase annuities from qualified insurance carriers for participants or take such other actions may be appropriate. Persons who terminate a plan with intent to circumvent the Act or the WPPDA shall be personally liable for losses.

Section 405. Recovery

This section provides that, where employers in terminated plans are not insolvent, they or their successors in

interest may be liable for reimbursement of a portion of insurance benefits paid. The liability of the employer is to pay 100% of the unfunded vested liabilities and in no event shall it exceed 50% of the employer's net worth.

The Secretary shall make arrangements with employers on equitable terms for the reimbursement of insurance paid.

The amount or amounts of any unpaid liability owned by an employer shall constitute a lien in favor of the government, but junior to any lien for unpaid taxes owed to the government

Section 406. Pension Benefit Insurance Fund

This section establishes within the Labor Department a fund for the deposit of premiums, assessments, etc., made under the Act and for payment of such claims thereunder.

TITLE V. GENERAL PROVISIONS

Section 501. Variations; Appeals Board

The Secretary is authorized to grant variations from the requirements of titles II and III and Section 112. A Variation Appeal Board would be established to hear and determine appeals from decisions denying grants of variations.

Section 502. Studies

This section directs the Secretary to conduct research relating to the effects of the act, the role of private pensions, the operation of public and private pension plans,

and the methods to encourage the growth of the private pension system.

Section 503. Enforcement

This section would give the Secretary authority to conduct such investigations as may be necessary to determine whether any person has violated or is about to violate any provisions of title II or III or any rules or regulations which would result from enactment of titles II and III. Information about such investigations would be made available to any interested person and included in an annual report by the Secretary. Criminal penalties of five years imprisonment and $10,000 fine or up to a $200,000 fine in the case of a corporate felon would be assessed for willful violation of the Act. Civil actions by the Secretary, participants or beneficiaries to enforce the provisions of the Act are authorized in Federal Court.

Section 504. Annual report of the Secretary

The Secretary would be required to submit an annual report to the Congress covering his administration of the Act.

Section 505. Rules and regulations

This section would authorize the Secretary to prescribe such rules and regulations as he finds necessary to carry out the provisions of the Act.

Section 506. Other agencies and departments

The Secretary would be authorized to enter into agreements that would avoid unnecessary expense and duplication and would permit cooperation among government agencies in performing his functions under title

II, or III. He would also be authorized to reimburse other federal agencies for facilities or services he utilized in doing so. The Attorney General would be authorized to receive such evidence as developed by the Secretary which may be found to warrant consideration for criminal prosecution.

Section 507. Administration

Chapters 5 and 7 of Title 5. United States Code (relating to administrative procedure) would be applicable to this Act.

No employee of the Department of Labor would be able to administer or enforce the Act with respect to any employee organization of which he is a member or employer organization in which he has an interest.

Section 508. *This section would authorize to the Secretary such sums as may be necessary to carry out this Act*

Section 509. *If any provision of this Act were held invalid, the remainder of the Act would not be affected*

Section 510. *Interference with the rights protected under the Act would be unlawful. – The provisions of sections 404 and 405 would be applicable in the enforcement of this section.*

Section 511.

Any person who used coercion to interfere with the rights protected under the act would be subject to a $10,000 fine and/or imprisonment for up to one year.

Section 512. Registration

Within six months after the effective date of titles II and III, each pension and profit-sharing plan would have to file an application with the Secretary of Labor for qualification and registration. Plans established after that date would have six months in which to file such application. Plan amendments similarly would have to be reported to the Secretary. A certificate would be issued and continued in force so long as the eligibility, vesting and funding requirements of the Act are met.

Section 513. Enforcement of Registration

The Secretary of Labor may seek a court order to secure compliance whenever a determination is made that no application for registration has been filed, that the application should be denied or the registration canceled, or that a plan has failed to make the required contributions or to pay such other assessments or fees as are required.

Section 514. Effect on other laws

All State laws would be pre-empted except for those covering plans not subject to titles II and III.

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

(2)

No. 91-1698

In The

Supreme Court of the United States

October Term, 1991

ROGER OLSON,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION, a foreign corporation, ALLIED SIGNAL, INC., a foreign corporation, AMEX SYSTEMS CORPORATION (a wholly owned subsidiary of ALLIED SIGNAL, INC.), SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, a foreign corporation, and SAIC RANGE SYSTEMS, a California corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court contradict Congress' requirement that ERISA plans be in writing by allowing employees to seek to increase their ERISA benefits based upon alleged oral promises through the federal common law?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Ninth Circuit were Roger Olson, General Dynamics Corporation, Allied-Signal, Inc., Science Applications International Corporation, and SAIC Range Systems (formerly Amex Systems, Inc.).

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

OPINION BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

A. Factual History 2

1. OLSON's Employment With Respondents .. 2

2. The AMEX Meeting and the Alleged Misrepresentation 3

3. OLSON's Knowledge About the AMEX Benefits Before Accepting AMEX's Offer 4

4. OLSON's Acceptance of the AMEX Offer .. 4

B. Procedural History 5

REASONS FOR DENYING THE PETITION 6

A. Federal Courts Have Consistently Held That the Written Terms of an ERISA Plan Cannot Be Orally Modified 7

B. There Is No Conflict Between the Circuits on This Point 9

1. *Armistead* and *Black* Did Not Allow the Plaintiffs to Change the Written Plans Through Estoppel 9

2. *Armistead* and *Black* Are Also Distinguishable Because They Did Not Involve the Same Type of Benefit Plans 9

TABLE OF CONTENTS – Continued

Page

C. This Court Should Not Allow OLSON to Circumvent ERISA by Seeking a Federal Common Law Remedy 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. *John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) 12

Armistead v. *Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) 9

Black v. *TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990) 9, 10

Blau v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985) 12

Cefalu v. *B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) 8, 12

Davidian v. *Southern California Meat Cutters Union*, 859 F.2d 134 (9th Cir. 1988) 7

Degan v. *Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989) 8, 12

Massachusetts Mutual Life Ins. Co. v. *Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) 11

Menhorn v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984) 11

Musto v. *American General Corp.*, 861 F.2d 897 (6th Cir. 1988) 7, 8

Nachwalter v. *Christie*, 805 F.2d 956 (11th Cir. 1986) ..8, 10

Northwest Administrators, Inc. v. *B.V. & B.R., Inc.*, 813 F.2d 223 (9th Cir. 1987) 8

Phillips v. *Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) 12

Scott v. *Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985) 12

TABLE OF AUTHORITIES – Continued

Page

Straub v. *Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) 8, 11, 12

Young v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 529, 102 L.Ed.2d 561 (1988) 9

STATUTES

28 U.S.C. section 1441 5

29 U.S.C. section 1001, et seq 5

29 U.S.C. section 1002(a)(1) 7

29 U.S.C. section 1140 6

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ROGER OLSON,

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent GENERAL DYNAMICS CORPORATION ("GENERAL DYNAMICS") respectfully submits this

Opposition to the Petition for Writ of Certiorari filed by ROGER OLSON.

OPINION BELOW

The published decision of the Ninth Circuit Court of Appeals is attached to the Petition as Appendix A at pp. 1-13.

JURISDICTION

GENERAL DYNAMICS does not disagree with petitioner's Statement of Jurisdiction.

STATEMENT OF THE CASE

A. Factual History.

1. OLSON's Employment With Respondents.

In July of 1955, OLSON began working for GENERAL DYNAMICS where he was assigned to the Range Systems product line. OLSON later became a vested participant in GENERAL DYNAMICS' employee pension and benefit plans. On March 28, 1986, GENERAL DYNAMICS sold the Range Systems product line to ALLIED-SIGNAL INC.'s subsidiary, AMEX SYSTEMS, INC. ("AMEX"). On April 28, 1986, OLSON accepted AMEX's offer of employment and became a participant in

the AMEX employee benefit plans. On January 8, 1988, AMEX sold the Range Systems product line to SCIENCE APPLICATIONS INTERNATIONAL CORPORATION ("SAIC"), where OLSON worked and participated in SAIC's benefit plans until his retirement in June of 1988.

2. The AMEX Meeting and the Alleged Misrepresentation.

The day before the GENERAL DYNAMICS sale to AMEX, GENERAL DYNAMICS and AMEX representatives held a meeting with the Range Systems employees, including OLSON, to discuss their future employment. At the AMEX meeting, OLSON and the other Range Systems employees were told unequivocally that they were being terminated by GENERAL DYNAMICS as a result of the sale.

As part of the sale, AMEX offered to hire all Range Systems employees. At that meeting, AMEX's President stated in part: "I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to your present position. The details of this will be discussed in personal interviews and they will be scheduled shortly . . . . " That statement is the complete extent of alleged misrepresentation upon which OLSON bases this lawsuit. Apparently, OLSON interpreted it as a promise that his AMEX benefits would be identical to his GENERAL DYNAMICS benefits in every detail.

Other statements at the AMEX meeting establish the unreasonableness of OLSON's interpretation of the statement. For example, other representatives of both companies discussed in detail the AMEX employee benefit

plans, including such benefits as vacation, sick leave, dental, savings plan, and retirement. At one point, AMEX's general manager stated that "we recognize full well that there is [sic] differences in each individual's position or status as they come over to AMEX and we are going to address that in detail in private interviews on an individual basis . . . . " Even during the AMEX meeting where OLSON claims the misrepresentation occurred, he was made aware that the AMEX benefits would not be identical to the GENERAL DYNAMICS benefits.

3. OLSON's Knowledge About the AMEX Benefits Before Accepting AMEX's Offer.

Even if OLSON misunderstood the description of the AMEX benefits during the AMEX meeting, before accepting AMEX's offer, he learned that the AMEX benefits would not be identical to the GENERAL DYNAMICS benefits. Accompanying his acceptance letter to AMEX, OLSON attached four pages of calculations detailing the differences he perceived between the GENERAL DYNAMICS and AMEX benefit plans. It is clear that OLSON suffered no illusions about the AMEX benefits before he started working for AMEX.

4. OLSON's Acceptance of the AMEX Offer.

Regardless of the differences between the GENERAL DYNAMICS and AMEX benefit plans, after being terminated by GENERAL DYNAMICS, OLSON's only choice was between becoming employed by AMEX (which included participation in the AMEX benefit plans with

credit for his years of service at GENERAL DYNAMICS) or looking for another job (where he would receive no credit for his years at GENERAL DYNAMICS). He did not have the option of remaining with GENERAL DYNAMICS and continuing to participate in the GENERAL DYNAMICS employee benefit plans.

Not surprisingly, OLSON chose to work for AMEX, not because of any representations about AMEX's employee benefits, but in spite of them. OLSON accepted AMEX's offer, knowing the benefits were different, because it was the best option available to him at the time.

B. Procedural History.

OLSON filed his complaint in California state court on April 17, 1989. In May of 1989, the respondents removed this case to federal court pursuant to the provisions of 28 U.S.C. section 1441 on the grounds that the federal court had original jurisdiction over this case under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. section 1001, et seq.

GENERAL DYNAMICS promptly moved to dismiss the majority of OLSON's claims because they were preempted by ERISA. On September 25, 1989, the District Court granted GENERAL DYNAMICS' motion to dismiss and gave OLSON 30 days in which to file an amended complaint.

OLSON filed his Amended Complaint on October 9, 1989. GENERAL DYNAMICS again moved to dismiss,

while the other respondents moved for summary judgment on the Amended Complaint. On March 21, 1990, the District Court granted the respondents' motions in a memorandum decision and order which is attached to the petition in Appendix A at pp. 14-19.[1]

On December 20, 1991, the Court of Appeals for the Ninth Circuit issued its decision affirming the District Court. On January 24, 1992, the Ninth Circuit denied OLSON's petition for rehearing.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari fails to meet the Supreme Court Rule 10 standard of presenting special or important reasons for review on writ of certiorari. Under Supreme Court Rule 10, this Court grants certiorari "only when there are special and important reasons therefor." This case does not merit Supreme Court review for several reasons.

[1] OLSON's Amended Complaint had contained a cause of action for discrimination against GENERAL DYNAMICS under 29 U.S.C. section 1140. OLSON dismissed that claim in order to perfect the appeal.

A. Federal Courts Have Consistently Held That the Written Terms of an ERISA Plan Cannot Be Orally Modified.

It is undisputed that OLSON is receiving every benefit due him under the respondents' written ERISA plans. In this lawsuit, based upon an alleged oral promise, OLSON seeks to receive a level of benefits greater than those he is entitled to under the written terms of the ERISA plans.

Congress has specifically provided that ERISA plans must be in writing. 29 U.S.C. section 1002(a)(1) provides in part:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

The writing requirement is a central feature of ERISA, not a mere technicality. A written agreement is required under ERISA to establish and maintain employee benefit plans, thus those terms should be adhered to. *Davidian* v. *Southern California Meat Cutters Union*, 859 F.2d 134 (9th Cir. 1988) and *Musto* v. *American General Corp.*, 861 F.2d 897 (6th Cir. 1988) (written plan is required so employee may determine exactly what his rights and obligations are). The rights of other employees properly covered under the fund should not be ignored, and fund assets should not be deflated because of alleged misrepresentations by a plan administrator. *Davidian* v. *Southern California Meat Cutters Union, supra*, 859 F.2d at p. 136.

OLSON has gone to great lengths to avoid ERISA for the simple reason that "no liability exists under ERISA for purported oral modifications of the terms of an

employee benefit plan." *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988). See also *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989) ("an oral agreement cannot be the basis of a cause of action under ERISA"); *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA precludes oral modifications to benefit plans"); *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, 813 F.2d 223, 226-227 (9th Cir. 1987) ("an oral agreement or tacit understanding . . . that conflicts with or alters the meaning of the written agreement should not be considered"); *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("this requirement that ERISA plans must be 'maintained' in writing precludes oral modification of the Plans"); and *Musto* v. *American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988) (clear terms of written employee benefit plan may not be orally modified or superseded by the employer).

The court in *Nachwalter* v. *Christie*, 805 F.2d 956 (11th Circuit 1986) explained why oral agreements or modifications to an ERISA pension plan cannot be enforced. The court cogently reasoned that if oral modifications were permitted, the rights of other plan participants would be jeopardized by oral agreements between plan officers and favored plan participants. *Id.* at 960. In such circumstances, "employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements." *Id.* at 960. In sum, permitting oral modification of pension plans would undermine the security of pension rights, the goal Congress sought to serve by requiring that they be put in writing.

B. There Is No Conflict Between the Circuits on This Point.

1. *Armistead* and *Black* Did Not Allow the Plaintiffs to Change the Written Plans Through Estoppel.

OLSON's reliance on *Armistead* v. *Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) and *Black* v. *TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990) to assert that there is a conflict among the Circuits is misplaced. The courts in *Armistead* and *Black* allowed the plaintiffs to use the concept of promissory estoppel to prevent their employers from unilaterally terminating the plaintiffs' ERISA benefits which were spelled out in written plans. Neither court allowed the plaintiffs to orally modify the terms of the written plans as OLSON is attempting to do in this case.

2. *Armistead* and *Black* Are Also Distinguishable Because They Did Not Involve the Same Type of Benefit Plans.

OLSON is seeking to increase the level of both his welfare benefits plans *and* his pension plans. In contrast, the plaintiffs in *Armistead* and *Black* were only seeking to receive the welfare benefit plans promised them in writing.

The reason that this distinction is significant is because there are two types of ERISA plans: pension plans, which are funded and have strict vesting and accrual requirements; and welfare plans, which have no such requirements. See *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct.

529, 102 L.Ed.2d 561 (1988). In the case of unfunded welfare plans, there is no particular fund which is depleted by paying benefits. *Black* v. *TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). Thus, there is less concern about the plan's actuarial soundness. *Id.* at 155.

C. This Court Should Not Allow OLSON to Circumvent ERISA by Seeking a Federal Common Law Remedy.

OLSON invites this Court to devise a special remedy for him under the guise of "federal common law." This Court should decline that invitation for the same reason the Ninth Circuit did: "For the reasons already discussed regarding the interplay between ERISA's preemption provision and its remedial scheme, we agree with the District Court that to devise a federal common law remedy for OLSON's claim would defeat the scheme created by Congress in ERISA." (Appendix A to the Petition, p. 13.)

The *Nachwalter* v. *Christie*, 805 F.2d 956 (11th Cir. 1986) court also rejected an attempt to apply federal common law so as to allow oral modifications of employee benefit plans.

> A central policy goal of ERISA is to protect the interests of employees and their beneficiaries in employee benefit plans. This goal would be undermined if we permitted oral modifications of ERISA plans because employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements. This problem would be exacerbated by the fact that these oral agreements

> often would be made many years before any attempt to enforce them.

Id. at 960.

This result is consistent with *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), in which this Court held that a fiduciary to an employee benefit plan could not be held liable under ERISA to a plan participant or beneficiary for extra-contractual compensatory or punitive damages caused by untimely processing of claims. This Court noted that ERISA's civil "enforcement scheme [was] crafted with such evident care" that Congress did not intend for implied rights of action to supplement the express provisions. *Id.* at 147-48, 105 S.Ct. at 3092-93. Similarly, ERISA's express requirement that the written terms of a benefit plan shall govern forecloses the argument that Congress intended for ERISA to incorporate state law notions of promissory estoppel. *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262, 1265-66 (10th Cir. 1988).

While federal common law may have a place in the interpretation of ERISA when interpretation is necessary,[2] the "common law" concept should not be tortured to include judicially overruling Congress' explicit requirement that ERISA plans be in writing. What OLSON is

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[2] For example, federal common law in an ERISA context may supplement the statutory scheme, it may refine statutory standards that are set out in only general terms, and it may develop legal principles to regulate benefit plans previously within the province of state law. See *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984). No such interpretation or expansion of ERISA is necessary here.

asking this Court to do is nothing less than to read a preempted state fraud claim back into ERISA in direct contravention of the express statutory language enacted by Congress. Every circuit which has been faced with a case such as this one has held that ERISA preempts all common law causes of action for fraud.[3] As the Fifth Circuit noted in *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989), "[t]he problem, however, is one for Congress and not for this court to resolve, for we are bound by ERISA's emphatic preference for written agreements."

CONCLUSION

Petitioner has not raised an issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the Petition for Writ of Certiorari.

DATED: May 14, 1992

Respectfully submitted,

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---

[3] See *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988); *Anderson* v. *John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985); and *Scott* v. *Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985).

Supreme Court, U.S.
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(3)

No. 91-1698

In The

Supreme Court of the United States

October Term, 1991

ROGER OLSON

Petitioner,

vs.

GENERAL DYNAMICS CORPORATION, ALLIED SIGNAL, INC., AMEX SYSTEMS CORPORATION, SCIENCE APPLICATIONS INTERNATIONAL CORPORATION and SAIC RANGE SYSTEMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

May the federal courts devise a federal common law remedy of equitable estoppel to create an exception to ERISA's expansive preemption clause, which preempts all state law claims that relate to employee benefit plans?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

Factual History 1

Procedural History 3

REASONS FOR DENYING THE WRIT 5

I. Olson Asserts a New Issue in his Petition for Certiorari 6

II. There is No Genuine Conflict Among the Circuits Concerning the Scope of ERISA Preemption 7

A. Olson Does Not Have a Wrong Without a Remedy 7

B. Olson's Authority Is Inapposite 9

C. The Circuit Courts Unanimously Have Held that ERISA Preempts State Common Law Claims 12

III. Granting Olson a Special Remedy Would Thwart the Statutory Scheme 13

IV. Olson's Fraud Claim is Frivolous 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987) 12

Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 10, 11, 12, 14

Black v. TIC Investment Corp., 900 F.2d 112 (7th Cir. 1990) 11

Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985) 12

Cefalu v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989) 8, 12

Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989) 8, 13

Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 6

Fine v. Barry and Enright Productions, 731 F.2d 1394 (9th Cir. 1984), *cert. denied* 469 U.S. 881 (1984) 14

Girard v. Ball, 125 Cal. App. 3d 772, 178 Cal. Rptr. 406 (1981) 14

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3rd Cir. 1990) 8

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) 8, 12

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) 8, 10

Northwest Administrators, Inc. v. B.V. & B.R., Inc., 813 F.2d 223 (9th Cir. 1987) 8

TABLE OF AUTHORITIES – Continued

Page(s)

Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)..... 12

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 9

Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989)..... 8

Straub v. Western Union Telegraph Co., 851 F.2d 1262 (10th Cir. 1988).....8, 12

Youakim v. Miller, 425 U.S. 231 (1976)..... 6

OTHER AUTHORITIES

28 U.S.C. § 2201..... 4

29 U.S.C. § 1102(a) 10

ERISA § 502(a)(1)(B).....7, 8

STATEMENT OF THE CASE

Factual History

Respondents Allied-Signal, Science Applications International Corporation, SAIC Range Systems (formerly Amex Systems Inc. ("Amex")) (collectively referred to as "respondents" unless separate distinction is necessary) are satisfied with Olson's summary of his employment history. Respondents also agree that during a transition meeting with General Dynamics employees, the Amex president stated:

> I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to your present position. The details of this will be discussed in personal interviews and they'll be scheduled shortly . . . .

C.R. 28, Exhibit B.[1] However, by omitting certain material facts, Olson has failed to place this allegedly misleading statement in its proper context.

Olson claims that he interpreted the president's remark as a promise that his Amex benefits would be identical to his General Dynamics benefits in every detail. Since Olson had already received copies of the Amex plan summaries prior to the meeting, however, his claimed interpretation was plainly unreasonable. C.R. 28, Exhibit A at 57-58. Other statements made at the same meeting also belie the reasonableness of Olson's interpretation.

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[1] Citations in this memorandum to "C.R." refer to the clerk's record filed with the Ninth Circuit Court of Appeals.

For example, General Dynamics and Amex representatives discussed the specific provisions of the Amex benefit plans, including vacation, sick leave, and retirement, at the meeting. C.R. 28. Moreover, the general manager of Amex stated that there would be differences in "each person's position or status as they come over to Amex" and that such differences would be discussed "in detail in private interviews on an individual basis . . . " C.R. 28, Exhibit B at 15-16. Thus, even during the meeting in which Olson claims the fraudulent misrepresentation occurred, he was or reasonably should have been aware that the Amex benefits would *not* be identical to the General Dynamics benefits.

Moreover, Olson did not rely on the alleged representation in accepting Amex's job offer. He knew exactly what his Amex benefits would be, and that they would be less than he would have received had he not been terminated by General Dynamics. Olson's deposition testimony is clear on this point:

> By Mr. Pulliam:
>
> Q. So there is no question in your mind that *at the time that you accepted Amex's offer of employment you were aware that the benefit package* that would be available to you *at Amex was not equivalent* to the benefit package that you had received at General Dynamics and which you would continue to receive at General Dynamics if the option of remaining in General Dynamics' employ was available to you, correct?
>
> A. That was my impression at the time and as expressed in the [acceptance] letter.

C.R. 28, Exhibit A at 116 (emphasis added). Olson's acceptance letter to Amex contained four pages of calculations detailing the differences he perceived between the General Dynamics benefits and the Amex benefits. In that letter, Olson also stated:

> The reason for my acceptance is not that I find the offer attractive, or even fair and reasonable. It is rather that there is no other way to forestall the immediate loss of very substantial early retirement benefits arising from my employment with General Dynamics Corporation.

C.R. 28, Exhibit C. In yet another memorandum prepared by Olson, he stated:

> I was informed that, if I did not accept employment with Amex my early retirement benefits at age 55 would be "actuarially reduced." It was explained that this meant by 63.48 percent . . . . Since a loss of this magnitude would be extremely difficult to overcome, I had little choice but to accept the Amex offer in spite of its deficiencies.

C.R. 28, Exhibit D.

Procedural History

On April 17, 1989 Olson filed his original complaint in state court alleging breach of contract, third party beneficiary, negligent misrepresentation, promissory estoppel, conspiracy to defraud, and common count. Stripped of legalese, Olson simply alleged that he was promised benefits he did not receive.

Respondents removed the action to the United States District Court for the Southern District of California, and promptly moved to dismiss on the grounds that Olson's state common law claims were preempted by ERISA. At the hearing on respondents' motion to dismiss, Olson abandoned the legal theories of his original complaint, which eschewed ERISA and alleged almost every common law cause of action except intentional fraud. Instead, Olson's lawyer relied exclusively on "what [he] believe[s] to be a fraud exception to the general line of cases that were cited by the moving parties . . . . " Hearing Transcript at p. 4. The district court granted the motion to dismiss, holding that Olson's "allegations of broken promises . . . relate[ ] to the benefit plan." *Id.* at 6.

The district court graciously permitted Olson to file an amended complaint to allege common law fraud, discrimination under ERISA (against General Dynamics only), and declaratory relief. In his declaratory relief claim, Olson alleged "that if ERISA provides no remedy for the action of defendants and each of them, this Court has the power under 28 U.S.C. § 2201 and the doctrine of federal common law to devise an appropriate remedy commensurate with the fraud committed by defendants and each of them." Absent from this first (and final) amended complaint was Olson's original claim for promissory estoppel.

General Dynamics once again moved to dismiss. The remaining respondents joined in that motion and separately moved for summary judgment on grounds of ERISA preemption. The district court granted both motions, holding that "[e]ven if there was a misrepresentation, and the court does not find that there was one, his

claim arises as a participant in both ERISA plans and consequently relates to those plans and is preempted." The court also declined to create an exception to ERISA preemption under federal common law, holding that "to devise a special remedy for Olson's fraud claim . . . would defeat the scheme created by Congress in ERISA."

On appeal, the Ninth Circuit affirmed the district court's judgment in every respect. Olson petitioned for rehearing, asserting equitable estoppel as the basis although he had not raised that legal theory previously. The Ninth Circuit denied that petition without comment.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because Olson bases his petition on a newly asserted claim of equitable estoppel, a claim Olson did not plead in his complaint or argue on summary judgment or appeal. Moreover, there is no genuine conflict among the circuits about whether the district court may devise a federal common law remedy as an exception to ERISA preemption – the issue raised below and before this Court. Finally, Olson's fraud claim is frivolous; he testified under oath that he knew exactly what his benefits would be before accepting employment with Amex and, therefore, did not justifiably rely on any alleged misrepresentation. Even if the Court found a legal basis for creating a federal common law exception to ERISA preemption, this case does not present the facts to warrant such an exception.

I. Olson Asserts a New Issue in his Petition for Certiorari.

Olson mischaracterizes the proceedings below in an attempt to obtain Supreme Court review based on the doctrine of equitable estoppel. In his original complaint Olson did allege promissory estoppel, but he consciously abandoned that legal theory in favor of fraud after he lost on respondents' first motion to dismiss. In the complaint governing this lawsuit – the first amended complaint – Olson did not plead a claim for equitable estoppel. In opposition to respondents' motion for summary judgment, Olson did not argue equitable estoppel and the district court did not consider it. On appeal, Olson again did not assert, and the Ninth Circuit again did not consider, a claim of equitable estoppel.

This Court previously has expressed a policy against considering issues raised for the first time in a petition for certiorari. In *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981), for example, the Court refused to consider the question of the district court's abuse of discretion in denying respondents' costs, stating that the issue "was not raised in the Court of Appeals and is not properly before us." 450 U.S. at 362. *Accord Youakim v. Miller*, 425 U.S. 231, 233 (1976) (the Court "does not decide questions not raised or resolved in the lower court" except in extraordinary cases).

Olson had ample opportunity to argue for equitable estoppel in the prior proceedings. He deliberately chose not to do so. His decision is not an extraordinary basis for granting certiorari now.

II. There Is No Genuine Conflict Among the Circuits Concerning the Scope of ERISA Preemption.

In an effort to manufacture a conflict among the circuits, Olson erroneously contends in his petition that "[t]he Ninth Circuit has stated that Olson . . . has no remedy under ERISA as a defrauded employee." Petition at 8. Moreover, Olson falsely attributes to the Ninth Circuit the holding that "[l]ying to employees is permissible under ERISA provided the lie is not in writing." *Id.* at 9. On these misstatements, Olson posits a conflict because "[o]ther circuits have come to a different conclusion." *Id.*

A. Olson Does Not Have a Wrong Without a Remedy.

In the first place, Olson *did* have a remedy under ERISA. He simply chose not to pursue it. In its opinion, the Ninth Circuit expressly recognized section 502(a)(1)(B) of ERISA, which provides civil remedies for plan participants. "At the time he filed this suit, Olson was therefore a 'participant' in each company's employee benefit plan, and he had the option of brining a suit under § 502(a)(1)(B)."

The fact that Olson could have pursued his claim under ERISA, but did not, underscores the absurdity of his contention that ERISA preemption of a state common law fraud claim leaves him with a wrong but not a remedy. It is simply not true, and neither the district court nor Ninth Circuit ever held, that Olson has no remedy at all. He merely has no remedy under state common law.

Presumably, Olson did not pursue a remedy under ERISA section 502(a)(1)(B) because, as the Ninth Circuit recognized, "ERISA's civil remedy probably does not extend to claims of oral misrepresentation regarding the level of benefits provided by a plan." *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1164 (3rd Cir. 1990) ("an ERISA welfare plan is not subject to amendment as a result of informal communications . . . . "); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) (informal or unauthorized modification of pension plans is impermissible under ERISA); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989) ("an oral agreement cannot be the basis of a cause of action under ERISA"); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA precludes oral modifications to benefit plans"); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) ("no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan"); *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer"); *Northwest Administrators, Inc. v. B.V. & B.R., Inc.*, 813 F.2d 223, 226-27 (9th Cir. 1987) ("an oral agreement or tacit understanding . . . that conflicts with or alters the meaning of the written agreement should not be considered"); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("this requirement that ERISA plans must be 'maintained' in writing precludes oral modification of the Plans").

Because Olson's fraud claim is premised on an alleged oral representation that in effect would modify the written plan, Olson would be unlikely to prevail

under ERISA. However, the fact that Olson may lose if he were to assert a claim under ERISA does not mean, as he contends, that he has suffered a wrong without a remedy. It means only that Congress has elected to disallow claims of the type that Olson seeks to assert in order to further the regulatory goals of ERISA. As this Court held in *Pilot Life Inc. Co. v. Dedeaux*, 481 U.S. 41 (1987):

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 54.

In any event, whether Olson would win or lose a claim asserted under ERISA is merely an academic exercise because Olson did not sue under ERISA and respondents never had the opportunity to argue that an oral representation cannot modify a written plan. The Ninth Circuit was careful to note this fact:

> It is important to emphasize that Olson has not asserted a claim under § 502(a)(1)(B), ERISA's civil remedial scheme. That cause of action is discussed here only to address the argument that Olson has no remedy available to him if his fraud claim is preempted by ERISA.

B. Olson's Authority Is Inapposite.

The cases Olson cites as evidence of a conflict among the circuits would be apposite only if Olson has sued under ERISA and raised the substantive question of

whether federal courts may apply the doctrine of equitable estoppel to create an exception to the general rule that oral representations cannot modify the terms of a written ERISA plan. That, of course, did not occur since Olson consciously chose *not* to sue under ERISA to avoid confronting the general rule in the first place. The issue here, by contrast, is whether federal courts may apply the doctrine of equitable estoppel to create an exception to ERISA preemption and thereby allow Olson to by-pass ERISA altogether.

For example, Olson relies on *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), where several employees elected early retirement from Vernitron based on their belief that their retirement insurance benefits had been carried over from a previous ERISA plan. When Vernitron tried to terminate those retirement insurance benefits, the employees sued to equitably estop Vernitron from doing so. Citing *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) – one of the cases holding that written ERISA plans may not be modified orally – Vernitron argued "against being estopped from denying insurance benefits [because] ERISA's requirement that a welfare plan be in writing precludes the application of equitable estoppel." *Vernitron*, 944 F.2d at 1299. Distinguishing *Nachwalter* on the basis that it involved a pension benefit plan as opposed to a welfare benefit plan, the court concluded that "the purpose of Congress in enacting 29 U.S.C. § 1102(a) would not be frustrated by estoppel principles. . . . "[2] *Id.* at 1300.

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[2] 29 U.S.C. requires that an ERISA plan be in writing.

Olson also relies on *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990). Black was terminated from his employment in connection with the sale of White Farm Equipment Company, Black's employer, to TIC Investment Corporation. White officials promised Black severance pay pursuant to an ERISA plan and, since White had gone into Chapter 11 bankruptcy, gave Black the option of filing a claim in bankruptcy or receiving a lesser cash payment of two months' salary. Black opted to file a claim in bankruptcy. White subsequently objected to that claim and the court dismissed it. Black sued under ERISA to equitably estop TIC (White's successor) from denying his severance benefits. Using essentially the same reasoning as *Vernitron*, the court held "that estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans under ERISA." *Black*, 900 F.2d at 115.

Thus, in both *Vernitron* and *Black*, the plaintiffs sued under ERISA for equitable estoppel, the defendants raised the defense that ERISA does not permit oral modifications to written plans, and the courts concluded that the doctrine of equitable estoppel can be used to create an exception to ERISA's written plan requirement in the narrow case of unfunded welfare benefit plans. *Vernitron* and *Black*, therefore, could not possibly be in conflict with the Ninth Circuit's present opinion because Olson did not sue under ERISA and respondents consequently never had the opportunity to argue that ERISA does not permit oral modifications to a written plan. Whether equitable estoppel can be used to create an exception to ERISA's written plan requirement – the issue involved in *Vernitron* and *Black* and possibly in conflict with other circuits – has

never been an issue in this case. Olson's petition for certiorari is a proverbial case of comparing apples and oranges; it does not present a conflict among the circuit courts.[3]

C. The Circuit Courts Unanimously Have Held that ERISA Preempts State Common Law Claims.

In this case, the relevant issue is whether a federal court may carve out an exception to ERISA preemption of state common law claims based upon the doctrine of equitable estoppel. The Ninth Circuit's holding that common law claims such as Olson's are preempted by ERISA is in accordance with every one of the circuit courts that, on materially indistinguishable facts, has considered this question of ERISA preemption. *See Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (9th Cir. 1987); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985).

Like the present case these cases involve participants in identifiable employee benefit plans. They involve the

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[3] As further evidence that there is not a conflict among the circuits, the Sixth Circuit has not found its decision in *Vernitron* to be in conflict with its decision in *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), where it held that "a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer." Olson's case, like *Musto*, is distinguishable from *Vernitron*.

sale, transfer, or closure of plaintiffs' place of employment. They involve alleged oral representations about the benefits the plaintiffs will be eligible to receive. They involve plaintiffs who ultimately did not receive the exact benefits they believed they should receive. And they all involve common law tort or contract claims, including fraud. Upon these facts, essentially identical to Olson's, the circuit courts unanimously have held that ERISA preempts common law claims.

III. Granting Olson a Special Remedy Would Thwart the Statutory Scheme.

In essence, Olson is demanding that the Court invoke federal common law to judicially overrule Congress's explicit preemption clause and read a preempted state claim back into ERISA. While federal common law may appropriately be consulted to aid in interpreting ERISA when interpretation is necessary, federal courts should not be allowed to use it to circumvent Congress's considered policy choice that assures equity among plan participants and preserves the actuarial integrity of ERISA plans. In a similar case where the plaintiff presented "a sympathetic, estoppel-based argument for fashioning federal common law," the Fifth Circuit reasoned cogently: "the problem, however, is one for Congress and not for this court to resolve. . . . " *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989).

IV. Olson's Fraud Claim is Frivolous.

Although the courts below disposed of Olson's claim by noting correctly that it is preempted by ERISA, the

district court could have granted summary judgment and the Ninth Circuit could have affirmed on the merits. *Fine v. Barry and Enright Productions,* 731 F.2d 1394, 1396 (9th Cir. 1984), *cert. denied* 469 U.S. 881 (1984) (appellate courts "may affirm summary judgment on any ground appearing on the record whether or not the district court relied on it"). Olson's state law fraud claim must fail since the facts of this case do not satisfy the basic elements of fraud; namely, misrepresentation and justifiable reliance. *See Girard v. Ball,* 125 Cal. App. 3d 772, 783, 178 Cal. Rptr. 406 (1981). Neither would the facts support a claim for equitable estoppel, if Olson had alleged it, since justifiable reliance is an element of equitable estoppel and is wholly lacking here. *Vernitron,* 944 F.2d at 1298.

Olson's state law fraud claim rests solely on the alleged misrepresentation that he would "be equal or better to [his] present position" if he went to work for Amex. C.R. 28, Exhibit A at 48-49. Olson's admissions about events immediately before and after the alleged misrepresentation, however, demonstrate that he knew all along precisely what the Amex benefits would be, and that he accepted employment with Amex in spite of marginally less benefits. For example, before the alleged misrepresentation, Olson had obtained documents that detailed the benefits he would receive as an Amex employee. Amex representatives specifically identified the Amex benefits within minutes of the alleged misrepresentation. In his acceptance letter to Amex, Olson himself described in detail the disparities he perceived between the benefits offered by his former employer and those offered by Amex. And he testified under oath that at the time he accepted Amex's employment offer, he

knew his Amex benefits would be less than his General Dynamics benefits had been.

Olson was not misled by the alleged misrepresentation, nor did he justifiably rely on it. Misrepresentation and justifiable reliance are necessary elements of fraud and equitable estoppel. Consequently, Olson's state law fraud claim assuredly would fail even if it were not preempted by ERISA. Similarly, even if federal courts were allowed to create an exception to ERISA preemption based on equitable estoppel – a proposition for which there is no authority – Olson could not state a prima facie case.

CONCLUSION

Certiorari should be denied because Olson relies on equitable estoppel without pleading it or asserting it in the proceedings below. Olson's contention that there is a conflict among the circuits simply misstates the procedural history of this case and the law. The preemptive scope of ERISA is expansive and does not permit a federal common law exception based on equitable estoppel or otherwise. As the Ninth Circuit correctly held, granting Olson the special remedy he seeks would allow him to circumvent the entire statutory scheme of ERISA.

There is no authority for such a remedy. Olson's petition should be denied.

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